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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 324. 79

COLBURN BARRELL AND AURELIA J. BARRELL,
PLAINTIFFS IN ERROR,

vs.

C. E. TILTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED OCTOBER 3, 1883.

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1 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,

vs.

COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

Plaintiff, complaining of the defendants, alleges:

That he is a citizen and resident of the State of New York; that the defendants are husband and wife, and are both residents and citizens of the State of Oregon; that the plaintiff is the owner in fee-simple of the following described real estate, and is lawfully entitled to and has the present right to the possession thereof, viz: All lying, situate, and being in the county of Multnomah and State of Oregon, and commencing one hundred and twenty (120) rods south and thirty-six (36) rods east of the northwest corner of the Selden Murray donation claim, in township one (1) south of range one (1) east, Willamette meridian; thence east fifty-seven and one-third ($57\frac{1}{3}$) rods; thence north sixty-eight & $\frac{4}{7}$ ($68\frac{4}{7}$) rods; thence west ninety-three and one-third ($93\frac{1}{3}$) rods; thence south one and four-sevenths ($1\frac{4}{7}$) rods; thence east ninety-two (92) rods; thence south sixteen (16) rods; thence west eighteen (18) rods; thence south twenty-five and six-elevenths ($25\frac{6}{11}$) rods; thence west thirty-eight (38) rods; thence south twenty-five and five-elevenths (25 —) rods, to the place of beginning, containing thirteen and one-fourth ($13\frac{1}{4}$) acres, more or less; that the defendants are in the wrongful and actual possession of said real estate, and wrongfully withhold possession thereof from plaintiff; that said real estate, of which the defendants are in possession, is of the value of thirteen thousand dollars.

Wherefore plaintiff prays judgment against said defendants for the recovery of the possession of said real estate, and for his costs and disbursements therein.

WHALLEY, FECHHEIMER & ACH,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA, *District of Oregon.* } *ss:*

I, Henry Ach, being first duly sworn, on oath say I am one of plaintiff's attorneys in the above-entitled cause; that plaintiff is not within this district, which is the reason why I make this affidavit; that the foregoing complaint is true, as I verily believe.

HENRY ACH.

Subscribed and sworn to before me this the 29th day of November, A. D. 1882.

R. H. LAMSON, *Clerk.*

Endorsed: "Filed November 29, 1882. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk. Complaint in ejectment."

2 And afterwards, to wit, on the 30th day of November, 1882, there was issued out of said court a summons in words and figures as follows, to wit:

3 *Summons.*

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL and AURELIA J. BARRELL. } No. 865.

The President of the United States to Colburn Barrell and Aurelia J. Barrell, the above-named defendants, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Portland, in said district, and answer the complaint filed against you in the above-entitled action within ten days from the date of the service of this summons upon you, if served within the county of Multnomah, in said district; or, if served within any other county of said district, then within thirty days from the date of such service upon you, and if you fail so to appear and answer, for want thereof the plaintiff will take judgment against you for the possession of the premises described in the complaint
4 herein and the costs and disbursements of this action; and this is to command you, the marshal of said district or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, affixed at Portland, in said district, this 30th day of November, 1883.

[Seal United States Circuit Court, Oregon.]

(S'g'd) R. H. LAMSON, *Clerk*,
By G. G. GAMMANS, *Deputy*.

5 DISTICT OF OREGON, *ss:*

In obedience to the command of the within writ, I have served the same upon the therein-named Colburn Barrell and Aurelia J. Barrell by exhibiting same to each of them and by delivering to each of them personally a true copy thereof, duly certified to by me as U. S. marshal of said district, together with a copy of the complaint in the within action, duly certified to by the clerk of the circuit court of said district, at Multnomah county, in said district, on the 1st day of December, A. D. 1882.

(S'g'd) EDWARD S. KEARNEY,
U. S. Marshal,
By CHAS. E. BURNS, *Deputy*.

[Endorsed:] No. 865. In the circuit court of the United States for the district of Oregon. C. E. Tilton *vs.* Colburn Barrrell and Aurelia J. Barrell. (Copy.) Summons. Returned and filed December 1, 1882. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

6 And afterwards, to wit, on Monday, the 11 day of December, 1882, the same being the 35 judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

7 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

DECEMBER 11, 1882.

Now at this day comes the plaintiff, by Mr. M. W. Fechheimer, of counsel, and the defendant, by Mr. W. W. Chapman, of counsel; and, upon motion of defendant, it is ordered that he be, and he hereby is, allowed to withdraw his plea herein and file a demurrer to the complaint.

8 And afterwards, to wit, on Monday, the 18 day of December, 1882, the same being the 41st judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceeding were had in said case, to wit:

9 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

DECEMBER 18, 1882.

Now at this day comes the plaintiff in the above-entitled cause, by Mr. Henry Ach, of counsel, and the defendants, by Mr. W. W. Chapman; and, upon motion of defendants, it is ordered that defendants be, and they are hereby, allowed to withdraw their plea and demurrer filed herein, and that Aurelia J. Barrell be, and she hereby is, allowed to file her demurrer to the complaint herein; and it is further ordered that Colburn Barrell be, and he hereby is, allowed until Monday next, December 25, 1882, in which to answer said complaint; and said demurrer being filed, this cause comes on to be heard thereon, and the court, having heard the arguments of counsel, will advise thereof.

10 And afterwards, to wit, on the 18 day of December, 1882, there was duly filed in said court a demurrer of Aurelia J. Barrell in words and figures as follows, to wit:

11 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,

vs.

COLBURN BARRELL and AURELIA JANE BARRELL, His Wife, Defendants.

Action to recover the possession of real property.

Now comes the defendant, Aurelia J. Barrell, wife of the said Colburn Barrell, one of the defendants, and demurs to the plaintiff's complaint, and assigns the following causes of demurrer, to wit:

(1.) That as the wife of Colburn Barrell she is improperly joined with him in the plaintiff's complaint.

(2.) That the complaint does not state facts sufficient to constitute a cause of action, because she is sued as the wife of her codefendant, and there are no allegations in the complaint of a cause of action for which she as such is responsible or liable.

(S'g'd) W. W. CHAPMAN,
Defendant's Attorney.

Endorsed: "Demurrer of Aurelia J. Barrell. Filed Dec. 18, 1882. R. H. Lamson, clerk."

12 And afterwards, to wit, on Wednesday, the 27 day of December, 1882, the same being the 46th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

13 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

DECEMBER 27, 1882.

Now at this day comes the plaintiff, by Mr. Henry Ach, of counsel, and the defendants, by Mr. W. W. Chapman, of counsel; and this cause having heretofore been heard upon the demurrer of Aurelia J. Burrell to the complaint herein, and now at this day, the court being fully advised in the premises, it is ordered that said demurrer be, and the same is hereby, overruled; and it is further ordered that Colburn Barrell have until Saturday, Dec. 30, 1882, to answer, and that Aurelia J. Barrell have until Tuesday Jan. 2, 1883, to answer.

14 And afterwards, to wit, on the 28 day of December, 1882, there was duly filed in said court an answer of Colburn Barrel in words and figures as follows, to wit:

15 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,

vs.

COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

Action to recover the possession of real property.

Now comes the defendant, Colburn Barrell, and says he only defends for so much of the lands described in the complaint as lies north of a line running west from a point in the eastern boundary 40 rods north of the southeast corner thereof, containing 2⅜ acres, more or less, and that the plaintiff deraigns title thereto through a conveyance from William S. Ladd and wife to the plaintiff, bearing date the 28th day of September, A. D. 1882, and not otherwise, and that the said Ladd and wife, at the date of said conveyance, ever since, and now are, citizens and residents of the State of Oregon;

16 that the said conveyance was collusively made with the sole intent of giving to this court jurisdiction in this action; that it was made without consideration, and to enable the said Ladd for his own use, in the name of the plaintiff, to maintain an action in this court for the recovery of the possession of the premises, and with the understanding and expectation that at some future time the said premises or the proceeds thereof should be reconveyed to the said Ladd or his assigns; and that at the date of the commencement of this action the said William S. Ladd was the real party in interest in this action; wherefore the defendant prays that this action may be dismissed.

This defendant, defending only for so much of the tract of land described in the complaint as lies north of a line running west from a point in the eastern boundary 40 rods north from the southeast corner thereof, containing 2⅜ acres, more or less, for answer says that he denies that the plaintiff is the owner in fee-simple, and denies that he is lawfully entitled to and has the present right to the

17 possession thereof; denies that the defendant is in the wrongful possession thereof, and denies that the defendant wrongfully withholds the possession thereof.

Wherefore he prays judgment, &c.

Defendant, further answering, says that as to so much of the tract of land described in the complaint as lies south of a line running west from a point in the eastern boundary and 40 rods north from the southeast corner of said tract of land, containing 11 acres, more or less, he is only the tenant of Aurelia J. Barrell, who is a resident of Multnomah county and State of Oregon.

This defendant, for a further and separate answer and defense, says he is the owner in fee-simple and entitled to the possession of all of that part of the tract of land described in the complaint which lies north of a line running west from a point in the eastern boundary, 40 rods north from the southeast corner of the said tract of land, containing 2⅜ acres, more or less.

Wherefore defendant prays judgment, &c.

18 This defendant, for a further and separate answer and defense, says that the plaintiff deraigns title to all that part of the tract of land described in the complaint which lies north of a line running west from a point in the eastern boundary of said tract of land, and 40 rods north from the southeast corner thereof, through a certain instrument of writing, executed by this defendant to William S. Ladd, bearing date the 18th day of January, A. D. 1877, which said instrument purports upon its face to be an absolute deed in fee-simple, embracing the said premises herein defended for, but which instrument was in reality a mortgage intended and understood by the said William S. Ladd and this defendant to secure the payment to the said Ladd of the sum of $3,850, together with interest thereon at one per cent. per month from the date of said instrument until paid; which said payment was to be made on or before the expiration of two years from the date of said instrument, which said sum defendant is ready and willing to pay.

19 Wherefore, &c.,

(S'g'd) W. W. CHAPMAN,
Def't's Att'y.

STATE OF OREGON, } ss:
Multnomah County, }

I, Colburn Barrell, being duly sworn, say the statements in the annexed answer are true as I verily believe.

(S'g'd) COLBURN BARRELL.

Subscribed and sworn to before me, the undersigned, this 28th day of December, A. D. 1882. Witness my hand and notarial seal affixed.

[SEAL.] (S'g'd) J. G. CHAPMAN,
Notary Public for Oregon.

Endorsed: "Answer of Colburn Barrell. Filed Dec. 28, 1882. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk."

20 And afterwards, to wit, on the 28 day of December, 1882, there was was duly filed in said court a motion to substitute Aurelia J. Barrell as defendant, in words and figures as follows, to wit:

21 In the Circuit Court of the United States for the District of Oregon.

E. TILTON, Pl'ff, *vs.* COLBURN BARRELL *et al.*, Def't-.

Action to recover real property.

Now comes Aurelia J. Barrell, under whom Colburn Barrell pleads tenancy in the above-entitled action, and prays the court to make her defendant in the place of the said Colburn Barrell as to the lands described in his said plea of tenancy.

Dec'r 28th, A. D. 1882.

W. W. CHAPMAN,
Attorney for the Petitioners.

Endorsed: "Motion to substitute Aurelia J. Barrell as defendant. Filed December 28, 1882. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk."

21*a* And afterwards, to wit, on the 8 day of January, 1883, there was duly filed in said court an opinion, in words and figures as follows, to wit:

21*b* U. S. Circuit Court, District of Oregon.

CHARLES E. TILTON
v.
COLBURN BARRELL and AURELIA JANE BARRELL. } No. 865.

Action to recover possession of real property.

WEDNESDAY, *December* 27, 1882.

(1) *Married Woman.*—Under the act of October 21, 1880 (Ses. L., p. 6), the wife is relieved of all "civil disabilities" not imposed upon the husband, and her "rights and responsibilities" as a "parent" are "equal" to those of the latter, and, therefore, she is, in legal contemplation, as much the head of the family as he is, and he may as well be presumed to be living with her as she with him.

(2) *Idem.*—At common-law a husband and wife might be jointly sued for a trespass, which, in legal contemplation, might be committed by two persons; and this includes an action of ejectment, which was originally only a remedy for trespass upon the rights of the termor or lessee by depriving him of the possession during his term or time in the land.

(3) *Idem.*—But, under the act of October 21, 1880, *supra*, the wife is as liable for the unlawful occupation of another's property as the husband is, and if they are both in the possession they may be joined as defendants in an action to recover the same, as though they were unmarried; and an allegation in the complaint that they "are husband and wife" is immaterial and may be disregarded.

DEADY, *J.*:

The plaintiff, a citizen of New York, brings this action against the defendants, citizens of Oregon, to recover the possession of a tract of land containing 13¼ acres, alleged to be worth $13,000, and situate in the county of Multnomah.

It it alleged in the complaint that the plaintiff is the owner in fee-simple of the premises and entitled to the possession of the same; that "the defendants are husband and wife," and are in "the wrongful and actual possession" of the premises, and "wrongfully withhold a possession thereof from the plaintiff."

The defendant, Aurelia Jane Barrell, demurs to the complaint, and assigns as causes of demurrer the following:

1. "That, as the wife of Colburn Barrell, she is improperly joined with him in the plaintiff's complaint."

2. That the complaint does not state facts sufficient to constitute a cause of action, because she is sued as the wife of her codefendant, and there are no allegations in the complaint of a cause of action for which she as such is responsible or liable."

The allegation that "the defendants are husband and wife" is an immaterial one, quite as much so as if it had been alleged they were father and and daughter, brother and sister, uncle and niece, or even partners in trade.

The defendants are not sued as "husband and wife," but as Colburn and Aurelia Jane Barrell—two natural persons and distinct individuals—to recover from them and each of them the possession of certain premises which plaintiff alleges that they, both of them, wrongfully withhold from him.

A judgment against one of them for the possession will not authorize the removal of the other.

Nor is it known but that the defendants are in possession under a claim of right to or interest in the premises in both the husband and wife, or in the latter exclusively.

Assuming, as the demurrer admits, that the complaint is true, the occupation of the premises by the wife is as much a wrong to the plaintiff as the husband's. The removal of one of them upon the judgment and process of the court is as necessary to the full enjoyment of his right of possession as the other.

By the act of October 21, 1880 (Ses. Laws, p. 6), the wife is relieved of all "civil disabilities" not imposed upon the husband. Her "rights and responsibilities" as a "parent" are "equal" to those of the husband. In short, she is now, in legal contemplation, as much the head of the family as he is, and he may as well be presumed to be living with her as she with him. More properly speaking, they may be said to live together as equals, conforming, as far as may be, their individual wills and conduct to the requirements and exigencies of the marital relation.

But I do not understand that, even at common law, ejectment to recover the possession of premises unlawfully withheld did not include the case of an unlawful occupation by a married woman, or that her occupation, if conjointly with that of her husband, was therefore so merged in his that the law could not take cognizance of it and give relief against it directly.

Mr. Chitty says (1 Chit., p. 105) that for "trespass, which may, in legal contemplation be committed by two persons conjointly, and for which several persons may be jointly sued, the husband and wife may be sued jointly for the act of both;" but the wife can only be sued "for her own actual wrongful trespass," and cannot become a party to a trespass "by her previous or subsequent assent" thereto during coverture.

The foundation of the action of ejectment—*ejectioni firmæ*—is the trespass committed by the intruder upon the term of the termor or lessee, and originally the relief obtained by it was confined to damages for such trespass, but by the end of the 15th century the plaintiff in the writ was allowed to recover both his term and damages. Adams on Eject., 7–9.

The trespass or injury to the plaintiff's right of possession complained of in this case, so far as appears, is the act of each of the defendants, and can only be redressed by a judgment for the possession against both of them.

It may be that if the husband is removed from the premises, the wife, from considerations of domestic convenience or marital obligations, will follow him.

But she may not, and, as has been said, she may remain in the possession, claiming the same in her own right, and may also allow her husband to return to the premises and occupy under her, and thus compel the plaintiff to relitigate his right to the possession with her in a separate and subsequent action.

But the plaintiff is entitled to bring his action against all persons in the actual possession of the premises (Or. Code C. P., 314), and recover the same, as against them all, in one action.

If there is any one among them who has no claim to the possession otherwise than as a person sustaining a domestic relation to a codefendant, he or she must decline the contest or stand or fall with such codefendant.

The demurrer is overruled.

Henry Ach, for the plaintiff; W. W. Chapman, for the defendant.

(S'g'd) MATTHEW P. DEADY,
U. S. District Judge for Oregon.

Endorsed: Filed January 8, 1883. R. H. Lamson, clerk.

22 And afterwards, to wit, on the 15 day of January, 1883, there was duly filed in said court a reply to answer of Colburn Barrell in words and figures as follows, to wit:

23 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

And now comes the plaintiff above named, and for reply to the new matter alleged in the answer of Colburn Barrell herein, denies that the conveyance by William S. Ladd and wife to this plaintiff of the property in the complaint described was collusively made. Denies that the said conveyance was made with the sole intent, or with any intent, to or at all made to give this court jurisdiction in this action. Denies that said conveyance was made without consideration, but, on the contrary, alleges that said conveyance was made to the plaintiff upon a full, true, and adequate consideration. Denies that said conveyance was made to enable said Ladd, either for his own use or for any purpose, either in the name of this
24 plaintiff or otherwise, or at all, to maintain an action in this court for the recovery of the possession of the premises in the said conveyance and in the complaint herein described, or for any purpose whatever, save and except to convey said land, and all his

interest thereto to this plaintiff. Denies that said transfer was made with the understanding or expectation that at some future time, or ever, or at all, the said premises, or the proceeds thereof, or any part thereof, should be reconveyed to said Ladd or his assigns. Denies that any understanding or expectation for reconveying said premises, or any part thereof, or the proceeds thereof, or any part thereof, to said Ladd, or to his assigns, was ever made or existed. Denies that said William S. Ladd was the real party in interest at the time of the commencement of this action, or ever has been, or is the real party in interest in this action; and, on the contrary, plaintiff avers that he is the sole owner of said described property, and he, this plaintiff, is alone entitled to the possession of the same.

And plaintiff, for reply to the third separate defense of de-
25 fendant, Colburn Barrell, denies that he, said defendant, is the tenant of defendant, Aurelia J. Barrell, or of any one, as to so much of said land described in the complaint as lies south of a line running west from a point in the eastern boundary and 40 rods north from the southeast corner of said tract of land, containing eleven acres, or to any part, portion, or parcel of said property in the complaint described. Denies that the defendant, Colburn Barrell, is the owner in fee, or at all the owner, or is entitled to the possession of all that part of the tract of land described in the complaint which lies north of a line running west from a point on the eastern boundary forty rods north from the southeast corner of the said tract of land, containing 2⅜ acres, or to any part thereof, or of or to any part or parcel of land in the complaint described.

And plaintiff, for reply to the last separate defense of said defendant, Colburn Barrell, says that said defendants, Colburn Barrell and Aurelia J. Barrell, ought not to be permitted to allege or say the facts in said last separate defense stated, for that said William
26 S. Ladd did heretofore, to wit, on the 4th day of December, A. D. 1879, and more than two years after the date of said mortgage executed to him by these defendants, duly institute a suit in the circuit court of the State of Oregon for the county of Multnomah against said Colburn and Aurelia J. Barrell for the object and purpose of having said deed declared to be a mortgage and for a decree foreclosing the same, and directing the sale of the premises in said mortgage and in the complaint herein described; that said defendants, Colburn and Aurelia J. Barrell, were each and both of them duly served with summons in said suit, and the said defendant, Colburn Barrell, was duly served with a copy of the complaint in said suit as required by law, and the said defendants, Colburn and Aurelia J. Barrell, did duly appear in said court and cause and did answer make to the complaint of said Ladd in said suit; that such proceedings were thereafter in said court and suit duly had, the said court then having jurisdiction of the parties and the subject-
27 matter to and of said suit, that on the 9th day of February, A. D. 1880, a final decree was duly made and entered in said cause by said court upon the merits of said suit, decreeing and declaring the said instrument, executed by said Colburn and Aurelia J. Barrell to said William S. Ladd on January 18th, 1877, to be a

mortgage; that in and by said decree it was by said court found that the condition of said mortgage had been broken by the said defendants. And it was therein further decreed by said court in said cause that the said mortgage be, and the same was, in and by said decree, duly foreclosed, and did further decree and order the property in said decree and in the complaint herein described — be sold in manner in said decree directed; and it was further, in said court and cause, decreed that the said Colburn Barrell and the said Aurelia J. Barrell, and each and both of them, and all persons claiming by, through, or under them, or either of them, be barred and foreclosed of all right, title, and interest in and to said property; that
28 such further proceedings were thereupon had in said court and cause that an order of sale of said property, in pursuance of said decree, was, on the 23d day of March, A. D. 1880, duly issued out said court in said cause, directed to the sheriff of Multnomah county, Oregon, requiring and directing him to sell the said property in said order of sale, decree, and in the complaint herein described in the manner in said decree and order of sale directed, as upon execution; that said property was by said sheriff duly advertised for sale, as by law directed; and upon the 25th day of March, A. D. 1880, the said sheriff did duly levy upon said property under and by virtue of said order of sale; and upon the 24th day of April, A. D. 1880, the same and the whole thereof was by said sheriff on said order of sale, and in the manner in said decree and order of sale directed, duly sold at public auction to the said William S. Ladd; that the said defendant, Colburn Barrell, was present and did take part in and assist at said sale; that such further proceedings were in said court and cause had that thereafter,
29 to wit, on the 15th of June, 1880, the said sale was by said court in all things confirmed, the said 15th day of June, 1880, being a day in the first next regular term of said court after said sale. And thereafter, to wit, on the twenty-fifth day of August, A. D. 1880, the said sheriff duly executed a deed to said property so sold and in the complaint herein described to said William S. Ladd; that no part of said property has been redeemed; that said decree remains and is unappealed from and unreversed; and plaintiff further alleges that all the facts in the last separate defense of defendant herein contained or mentioned were set forth and alleged by said Colburn Barrell and Aurelia J. Barrell in their answer in said suit in said circuit court of the State of Oregon for Multnomah county aforesaid; and plaintiff further alleges that he is the immediate grantee of said William S. Ladd and wife to said property in the complaint and answer herein alluded to and described.

Wherefore plaintiff prays judgment as in his complaint herein.

30 FECHHEIMER & ACH,
Atty's for Plaintiff.

UNITED STATES OF AMERICA, } ss.
District of Oregon, }

I, Henry Ach, being first sworn, on oath say I am one of the attorneys for the plaintiff named in the foregoing reply; that said plaintiff is not within this district, which is the reason why I make this affidavit; that the foregoing reply is true as I verily believe.

HENRY ACH.

Subscribed and sworn to before me this the 15th day of January, A. D. 1883.

[NOTARIAL SEAL.] PAUL R. DEADY,
Notary Public in and for Oregon.

Endorsed: "Reply to answer of Colburn Barrell. Filed Jan 15, 1883. R. H. Lamson, clerk."

31 And afterwards, to wit, on the 16 day of January, 1883' there was duly filed in said court a motion to strike out part of replication in words and figures as follows, to wit:

32 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

Action to recover the possession of real property.

The defendant, Colburn Barrell, moves the court to strike out so much of the plaintiff's replication to the third separate defense as alleges that this defendant is not the tenant of Aurelia J. Barrell, or of any one as to the premises described in said third separate defense and referred to in said portion of plaintiff's reply, for the following reasons:

1. The said portion of plaintiff's reply is sham, frivolous, and irrelevant.

W. W. CHAPMAN,
Attorney of Defendant.

Endorsed: "Motion to strike out part of replication. (No. 2.) Filed January 16, 1883. R. H. Lampson, clerk, by G. G. Gammans, deputy clerk."

33 And afterwards, to wit, on Friday, the 19 day of January, 1883, the same being the 60 judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

34 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

JANUARY 19, 1883.

Now at this day comes the plaintiff in the above-entitled cause, by Mr. Henry Ach, of counsel, and the defendants, by Mr. W. W. Chapman, of counsel, and this cause comes on to be heard upon the motion of Colburn Barrell to strike out part of plaintiff's reply and upon the motion of Aurelia J. Barrell to be substituted as defendant in place of Colburn Barrell, and the court, having heard the arguments of counsel, will advise thereof.

35 And afterwards, to wit, on Monday, the 22 day of January' 1883, the same being the 61 judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

36 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

JANUARY 22, 1883.

Now at this day comes the plaintiff in the above-entitled cause, by Mr. Henry Ach, of counsel, and the defendants, by Mr. W. W. Chapman, of counsel, and this cause having heretofore been heard upon the motion to substitute Aurelia J. Barrell as defendant in place of Colburn Barrell, and upon the further motion of Colburn Barrell to strike out part of the reply, and the court being now fully advised in the premises, it is ordered that said motion to substitute be, and the same hereby is, denied, and that the motion to strike out be, and the same hereby is, allowed; and it is further ordered that Aurelia J. Barrell have until Saturday next, January twenty-seventh, to answer and that Colburn Barrell have until Thursday next, January twenty-fifth, to demur to the reply herein.

37 And afterwards, to wit, on the 26 day of January, 1883, there was duly filed in said court an answer of Aurelia J. Barrell in words and figures as follows, to wit:

38 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,

vs.

AURELIA J. BARRELL and COLBURN BARRELL, Defendants.

Action to recover the possession of real property.

This defendant, A. J. Barrell, for answer to so much of the complaint as alleges that the plaintiff is a citizen and resident of the State of New York, says that the plaintiff deraigns title through a conveyance from William S. Ladd and wife to the plaintiff, bearing date the 28th day of September, A. D. 1882, and not otherwise, and that the said Ladd and wife at the date of said conveyance, ever since, and now are citizens and residents of the State of Oregon; that the said conveyance was collusively made with intent and for the purpose solely of giving to this court jurisdiction in this action; that the said conveyance was made without consideration and to enable the said Ladd, in the name of the plaintiff, for his own use and benefit, to maintain an action in this court for the possession of the premises described in the complaint, and with the understanding and expectation that at some future time the said premises, or the proceeds thereof, should be reconveyed to said Ladd or his assigns, and that at the date of the commencement of this action the said William S. Ladd was the real party in interest in this action. Whereupon this defendant prays judgment, &c.

This defendant, defending only for so much of the lands described in the complaint as lies south of a line running west from a point in the eastern boundary thereof 40 rods north from the southeast corner of the tract described in the complaint, containing 11 acres, more or less, says that she denies that the plaintiff is the owner in fee-simple of the tract so defended for; denies [that] the plaintiff is lawfully entitled to and has the present right to the possession thereof; denies that the defendant is in the wrongful possession thereof, and denies that the defendant wrongfully withholds from the possesion thereof.

This defendant, further answering, says she is the owner in fee-simple of so much of the tract described in the complaint as lies south of a line running west from a point in the eastern boundary of said tract 40 rods north from the south corner thereof, containing 11 acres, more or less, and entitled to hold the possession thereof.

Defendant, for a further and separate answer and defense, says that plaintiff deraigns title to so much of the premises described in the complaint as lies south of a line running west from a point in the eastern boundary thereof 40 rods from the southeast corner of said tract, containing 11 acres, more or less, through a conveyance executed by this defendant to William S. Ladd, bearing date the 18th day of January, 1877; that the said deed, though absolute upon its face, was understood and intended by the said Ladd and this defendant to be only a mortgage by this defendant of her separate property as security for Colburn Barrell to the said Ladd to secure

the payment to the said Land of the sum of $3,850 and in-
39 terest thereon at one per cent. per month from the date thereof until paid, payable in two years from date; that at the time of the execution of the said deed it was agreed that the said Ladd should execute to this defendant a defeasance by which, if the said Colburn Barrell or this defendant should pay the said sum of money as aforesaid, the said deed should be null and void, which the said Ladd neglected and failed to do; but, on the contrary, on the 22d day of March, 1877, by instrument in writing under his hand and seal, duly acknowledged, treating the said deed as absolute, sold, and contracted to sell, to Colburn Barrell the premises described in the complaint, including the said separate property of this defendant.

Wherefore defendant prays judgment, &c.

W. W. CHAPMAN,
Att'y for this Defendant.

STATE OF ORGEGON, } ss:
Multnomah County, }

I, Aurelia J. Barrell, the above-named defendant, being duly sworn, say the statements in the foregoing answer are true, as I verily believe.

AURELIA J. BARRELL.

Subscribed and sworn to before me, the undersigned, this 26th day of January, A. D. 1883. Witness my hand and official seal hereto affixed.

[NOTARIAL SEAL.] L. M. PARISH,
Notary Public in and for the State of Oregon.

Endorsed: "Answer of Aurelia J. Barrell. Filed Jan. 26, 1883. R. H. Lamson, clerk."

40 And afterwards, to wit, on the 29 day of January, 1883, there was duly filed in said court a motion to strike out part of answer of Aurelia J. Barrell in words and figures as follows, to wit:

41 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

And now comes the plaintiff above named and moves the court to strike out all that part of the last separate defense of defendant, Aurelia J. Barrell, in her answer herein pleaded, commencing with the word "that," on the thirteenth line of the fourth page of said answer, down to and including the word "defendant," on the sixth line of the fifth page of said answer, for the reason that all of said matter is redundant, irrelevant, immaterial, and is matter of evidence.

FECHHEIMER & ACH,
Att'ys for Pl'ff.

By leave of court the plaintiff hereby amends the above motion to strike out so that the portion referred to in the answer of Aurelia J. Barrell do commence with the seventeenth line of said 4th page thereof down to and including the words "of this defendant," on 7th line of the 5th page of the original answer herein filed.

FECHHEIMER & ACH,
Att'ys for Pl'ff.

Endorsed: "Motion to strike out part of answer of Aurelia J. Barrell. Filed January 29, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk."

42 And afterwards, to wit, on Monday, the 5 day of February, 1883, the same being the 69th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

43 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

FEBRUARY 5, 1883.

Now at this day comes the plaintiff, by Mr. Henry Ach, of counsel, and the defendant, by Mr. W. W. Chapman, of counsel, and this cause comes on to be heard upon plaintiff's motion to strike out part of the answer of Aurelia J. Barrell, and the court, having heard the arguments of counsel, will advise thereof; and the plaintiff, by consent of the defendants, is allowed to amend his motion, so as to identify the part to be stricken out, by reference to the original answer.

44 And afterwards, to wit, on Wednesday, the 7 day of February, 1883, the same being the 70th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

45 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

FEBRUARY 7, 1883.

This cause having heretofore been heard upon plaintiff's motion to strike out part of the answer of Aurelia J. Barrell, and now, at this day, the court being fully advised in the premises, it is ordered that said motion be, and the same hereby is, denied; and, upon motion of the plaintiff, it is ordered that he have until Monday, February 12, 1883, to reply to said answer.

46 And afterwards, to wit, on the 9 day of February, 1883, there was filed in said court a reply to separate answer of Aurelia J. Barrell in words and figures as follows, to wit:

47 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

And now comes the plaintiff above named and, for reply to the new matter alleged in the answer of Aurelia J. Barrell herein, denies that the conveyance by William S. Ladd and wife to this plaintiff of the property in the complaint described was collusively made. Denies that the conveyance last named was made with the intent or the sole purpose, or with any intent or purpose or at all, to give this court jurisdiction in this action. Denies that said conveyance was made without consideration, but, on the contrary, alleges that said conveyance was made to this plaintiff upon a full, true, and adequate consideration. Denies that said conveyance was made to enable said Ladd either for his own use or benefit, either in the name of this plaintiff or otherwise or at all, to maintain an action in this court for the possession of the premises described in the complaint, or for any purpose whatever, save and except to convey said land and all his interest therein to this plaintiff. Denies that this conveyance was made with the understanding or expectation that at some future time, or ever or at all, the said premises or the proceeds thereof, or any part thereof, should be reconveyed to said Ladd or his assigns. Denies that any understanding or expectation for reconveying said premises, or any part thereof, or the proceeds thereof, or any part thereof, to said Ladd or his assigns was ever made or existed. Denies that said William S. Ladd was the real party in interest in this action at the time of the commencement thereof, or ever has been or is, the real party in interest in this action, and, on the contrary, plaintiff alleges that he is the sole owner of said described property, and he, this plaintiff, is alone entitled to the possession thereof.

And for reply to the third separate defense of defendant, Aurelia J. Barrell, plaintiff denies that said defendant, Aurelia J. Barrell, is the owner in fee-simple, or at all the owner, of so much of the tract of land in the complaint described as lies south of a line running west from a point in the eastern boundary of said tract 40 rods north from the southeast corner thereof, containing eleven acres, more or less. Denies that she is entitled to the possession thereof. Denies that she, said defendant, is the owner in fee-simple, or at all the owner, or is entitled to the possession, of any part or parts of the land described in the complaint or answer herein.

And for reply to the last separate defense of said defendant, Aurelia J. Barrell, plaintiff admits that said conveyance from Colburn and Aurelia J. Barrell of date January 18th, 1877, was intended as a mortgage, but denies that said mortgage was payable in two years

from the date thereof, and, on the contrary, alleges that the same was expressly made payable on or before March 7th, 1878, and not otherwise. Denies that said Ladd agreed to execute a defeasance to this defendant either as alleged in the answer or otherwise or at all.

48 And, for further reply to said last separate defense, says that the defendant, Aurelia J. Barrell, ought not to be permitted to allege or say the facts in said last separate defense stated, for that said William S. Ladd did heretofore, to wit, on the 4th day of December, A. D. 1879, and more than two years after the date of said mortgage executed to him by the defendants herein, duly institute a suit in the circuit court of the State of Oregon for Multnomah county against said Colburn and Aurelia J. Barrell for the purpose and object of having said deed declared to be a mortgage, and for a decree foreclosing the same, and directing the sale of the premises in said mortgage and in the complaint herein described; that said defendants were each and both of them duly served with summons in said suit, and the defendant, Colburn Barrell, was duly served with a copy of the complaint in said suit, as by law required; and the said defendants, Colburn and Aurelia J. Barrell, did duly appear in said court and cause and did answer make to the complaint of said Ladd in said suit; that such proceedings were thereafter in said court and suit duly had; that, said court then having jurisdiction of the parties and the subject-matter to and of said suit, *that* on the 22nd day of March, A. D. 1880, a final decree was duly made and entered in said court upon the merits of said suit, decreeing and declaring the said instrument executed by said Colburn and Aurelia J. Barrell to said William S. Ladd, on January 18th, 1877, to be a mortgage; that in said decree it was by said court found that the condition of said mortgage had been broken by the said defendants; and it was therein further decreed by said court in said cause that the said mortgage be, and the same was, in and by said decree duly foreclosed, and did further decree and order the property in said decree and in the complaint herein described be sold in the manner in said decree described. And it was further in said court and cause decreed that the said Colburn Barrell and the said Aurelia J. Barrell, and each and both of them, and all persons claiming by, through, or under them, or either of them, be barred and foreclosed of all right, title, and interest in and to said property; that such further proceedings were thereupon had in said court and cause that an order of sale of said property, in pursuance of said decree, was on the 23rd day of March, A. D. 1880, duly issued out of said court in said cause, directed to the sheriff of Multnomah county, Oregon, requiring and directing him to sell the real property in said order of sale, decree, and in the complaint herein described, in the manner in said decree and order of sale directed as upon execution; that said property was by said sheriff duly advertised for sale as by law directed, and upon the 25th day of March, 1880, the said sheriff did duly levy upon said property, under and by virtue of said order of sale, and upon the 24th day of April, A. D. 1880, the same and the whole thereof was by said sheriff, on said order of sale and in the

manner in said decree and order of sale directed, duly sold at public auction to said William S. Ladd; that the said defendant, Colburn Barrell, was present and did take part in and assist at said sale, both for himself and as the duly authorized agent of the defendant, Aurelia J. Barrell; that such proceedings were thereafter in said
49 court and cause had that on June 15th, 1880, the said sale was by said court in all things confirmed, the said 15th day of June, 1880, being a day in the first next regular term of said court after said sale. And thereafter, to wit, on the 25th day of August, 1880, the said sheriff duly executed a deed of said property so sold and in the complaint herein described to said William S. Ladd; that no part of said property has been redeemed; that said decree remains and is unappealed from and unreversed, and plaintiff alleges that all the facts in the last separate defense of defendant herein contained or mentioned were set forth and alleged by said Aurelia J. Barrell and Colburn Barrell in their answers in said suit in the said circuit court of the State of Oregon for Multnomah county aforesaid. And plaintiff further alleges that he is the immediate grantee of said William S. Ladd and wife to said property in the complaint and answer herein alluded to and described.

Wherefore plaintiff prays judgment against defendants as in his complaint herein.

FECHHEIMER & ACH,
Att'ys for Pl'ff.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, Henry Ach, being first sworn, on oath say I am one of the attorneys for the plaintiff named in the foregoing reply; that plaintiff is not within this district, which is the reason why I make this affidavit; that the foregoing reply is true, as I verily believe.

HENRY ACH.

Subscribed and sworn to before me this 7th February, A. D. 1883.

[NOTARIAL SEAL.] PAUL R. DEADY,
Notary Public in and for Oregon.

Endorsed: "Reply to separate answer of Aurelia J. Barrell. Filed February 9, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk."

50 And afterwards, to wit, on the 9 day of February, 1883, there was duly filed in said court a motion for leave to amend reply to answer of Colburn Barrell in words and figures as follows, to wit:

51 In the circuit court of the United States for the District of Oregon.

C. E. TILTON, plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, defendants.

And now comes the plaintiff above named, and moves the court for leave to amend his reply to the separate answer of the defend-

ant, Colburn Barrell, herein in following particular, viz: By changing the date on the fourth line of the 5th page of said reply from the 9th day of February, A. D. 1880, to the 22nd day of March, A. D. 1880, so that the allegation sought to be amended shall read: "That on the 22nd day of March, A. D. 1880, a final decree was duly made and entered in said cause by said court upon the merits of said suit," &c., &c.

FECHHEIMER & ACH,
Att'ys for Plaintiff.

Endorsed: "Motion for leave to amend reply to answer of Colburn Barrell. Filed February 9, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk. Allowed February 12, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk."

52 And afterwards, to wit, on the 9 day of February, 1883, there was duly filed in said court an amendment of reply of plaintiff to answer of Colburn Barrell in words and figures as follows, to wit:

53 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,

vs.

COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

And now comes the plaintiff herein, and, leave of court being first thereunto had, makes and files this amendment to his reply to the separate answer of Colburn Barrell herein, to wit: Commencing with the 4th line of the 5th page of said reply, and in the place of the matter now therein to substitute the following down to the word "decreeing" on the 7th line of said 5th page of said reply, to wit: "That on the 22nd day of March, A. D. 1880, a final decree was duly made and entered in said cause by said court upon the merits of said suit."

FECHHEIMER & ACH,
Att'ys for Pl'ff.

UNITED STATES OF AMERICA, }
District of Oregon } *ss:*

I, Henry Ach, being first duly sworn, on oath say I am one of the attorneys for the plaintiff above named; that plaintiff is not within this district, which is the reason why I make this affidavit; that the facts alleged in the foregoing amendment are true, as I verily believe.

HENRY ACH.

Subscribed and sworn to before me this 9th day of February, A. D. 1883.

[NOTARIAL SEAL.]

PAUL R. DEADY,
Notary Public for Oregon.

Endorsed: "Amendment of reply of plaintiff to answer of Colburn Barrell. Filed February 9, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk."

54 And afterwards, to wit, on Monday, the 12 day of February, 1883, the same being the 72d judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

55 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

FEBRUARY 12, 1883.

Now at this day comes the plaintiff, by Mr. Henry Ach, of counsel, and the defendants, by Mr. W. W. Chapman, of counsel, and this cause comes on to be heard upon plaintiff's motion for leave to amend his reply to the answer of Colburn Barrell, and, the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby, allowed.

56 And afterwards, to wit, on the 17 day of February, 1883, there was duly filed in said court a motion to make replication to A. J. Barrell's answer more definite & certain in words and figures as follows, to wit:

57 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
C. BARRELL and A. J. BARRELL, Defendants.

Action at law to recover the possession of real property.

Now comes the defendant, A. J. Barrell, by her attorney, and moves the court that the plaintiff be required to make his replication herein more definite and certain in this, that where in plaintiff's replication to the last separate defense it is alleged "that the same was expressly made payable on or before March 7th, 1878, and not otherwise," it should state by whom, and how it was so expressly made payable—whether by the said W. S. Ladd, the said Colburn Barrell, the said A. J. Barrell, or the three or any two of them together, and whether the same was in writing or otherwise.

W. W. CHAPMAN,
Attorney for A. J. Barrell.

Endorsed: "Motion to make replication to A. J. Barrell's answer more definite and certain. Filed Feb. 17, 1883. R. H. Lamson, clerk."

58 And afterwards, to wit, on Friday, the 23 day of February, 1883, the same being the 77th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

59 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

FEBRUARY 23, 1883.

This cause having heretofore been heard on the motion of the defendant, A. J. Barrell, to make the reply more certain, and taken under advisement by the court, and now, at this day, the court being fully advised in the premises, it is ordered that said motion be, and the same hereby is, allowed.

60 And afterwards, to-wit, on the 28 day of February, 1883, there was duly filed in said court an amendment & addition to reply to answer of Aurelia J. Barrell in words and figures as folfows, to wit:

61 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

And now comes the plaintiff above named, and the court having heretofore ordered that he do make more definite and certain his reply to the separate answer of Aurelia J. Barrell, in that part thereof in which the following denial and allegation appear, the same commencing with the 19th line of the 3rd page of said reply, to wit: "But denies that said mortgage was payable in two years from the date thereof, and, on the contrary, alleges that the same was expressly made payable on or before March 7th, 1878, and not otherwise," by showing and alleging with whom and how the said mortgage was so made payable, alleges and says:

That said mortgage was so made payable on or before the said March 7th, 1878, by a writing under seal, made and executed by Wm. S. Ladd to said defendant, Colburn Barrell, on the 22nd of March 1877, which said writing was duly executed as a
62 defeasance of said mortgage and the whole thereof at the request of said Barrell, acting for himself and said Aurelia Jane Barrell, and said defeasance was delivered to and accepted by said defendants; and plaintiff is informed and believes that said writing is now in possession of said defendant, Colburn Barrell, and therefore alleges that said Colburn Barrell, ever since its delivery, had and still has the said written defeasance in his control and posses-

sion, for which reason the plaintiff cannot now set forth the whole of said defeasance herein.

FECHHEIMER & ACH,
Att'ys for Pl'ff.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, Henry Ach, being first duly sworn, on oath say: I am one of the attorneys for the plaintiff named in the foregoing amendment and addition to reply; that said plaintiff is not within the district, which is the reason why I make this affidavit; that the facts above pleaded are true, as I verily believe.

HENRY ACH.

Subscribed & sworn to before me this the 27th day of February, A. D. 1883.

[NOTARIAL SEAL.] PAUL R. DEADY,
Notary Public in & for Oregon.

Endorsed: "Amendment and addition to reply of pl'ff to answer of Aurelia J. Barrell. Filed February 28, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy."

63 And afterwards, to wit, on the 2 day of March, 1883, there was duly filed in said court motion to make amendment to reply more definite in words and figures as follows, to wit:

64 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and A. J. BARRELL, Defendants.

Action to recover the possession of real property.

And now comes the defendant, Aurelia J. Barrell, by her attorney, and moves the court that the plaintiff be required to make the amendment to his reply to the defendants' last separate defense more definite and certain in this, that where in said amendment he states "which said writing was duly executed as a defeasance of said mortgage and the whole thereof at the request of said Barrell, acting for himself and said Aurelia J. Barrell," it should state substantially what the writing was, its nature and conditions—whether an agreement, a contract of sale, a title bond, or a condition to the absolute deed—so that the court may judge of its import, and whether a defeasance or not.

65 (2) It should state by what authority Colburn Barrell acted for Aurelia J. Barrell.

(3) It should give the date of such request, as well as the date of such acceptance of the writing.

And the said defendant further moves the court to strike out all that part of the plaintiff's said amendment beginning with the words

"And the plaintiff is informed and believes," and including the remaining portion of his said amendment as being sham, frivolous, and irrelevant.

W. W. CHAPMAN,
Attorney for A. J. Barrell.

Endorsed: "Motion to make amendment to reply more definite and to strike out part of amendment as sham, &c. Filed March 2, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk."

66 And afterwards, to wit, on Wednesday, the 7 day of March, 1883, the same being the 82d judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

67 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

MARCH 7, 1883.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. Henry Ach, of counsel, and the defendant, by Mr. W. W. Chapman, of counsel, and this cause comes on to be heard upon defendants' motion to make the amended reply to answer of Aurelia J. Barrell more definite and certain; and the court having heard the arguments of counsel, and being fully advised in the premises, it is ordered that said motion be, and the same hereby is, allowed.

68 And afterwards, to wit, on the 8 day of March, 1883, there was duly filed in said court an engrossed amended reply in words and figures as follows, to wit:

69 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA BARRELL, Defendants.

And now comes the plaintiff herein, and leave of court being first thereunto had, makes and files this his amended reply to the separate answer of Aurelia J. Barrell, and denies that the conveyance of William S. Ladd and wife to this plaintiff of the property in the complaint described was collusively made. Denies that the conveyance last named was made with the intent, or with the sole purposes, or with any intent or purpose at all, to give this court jurisdiction in this action. Denies that said conveyance was made without consideration, but, on the contrary, alleges that said conveyance was made to this plaintiff upon a full, true, and adequate consideration.

Denies that said conveyance was made to enable said Ladd, either for his own use or benefit, either in the name of this plaintiff, or otherwise, or at all, to maintain an action in this court for the possession of the premises described in the complaint, or for any purpose whatever, save and except to convey said land and all his interest thereto to this plaintiff. Denies that said conveyance was made with the understanding or expectation that at some future time, or ever, or at all, the said premises, or the proceeds thereof, or any part thereof, should be conveyed to said — or to his assigns. Denies that any understanding or expectation for reconveying said premises, or any part thereof, or the proceeds thereof, or any part thereof, to said Ladd, or to his assigns, was ever made or existed. Denies that said William S. Ladd was the real party in interest in this action at the time of the commencement thereof, or ever has been, or is the real party in interest in this action, and, on the contrary, plaintiff alleges that he is the sole owner of said described property, and he, this plaintiff, is alone entitled to the possession thereof.

And, for reply to the third separate defense of defendant, Aurelia J. Barrell, plaintiff denies that said defendant, Aurelia J. Barrell, is the owner in fee-simple, or at all the owner, of so much of the tract of land in the complaint described as lies south of a line running west from a point in the western boundary of said tract, 40 rods north from the southeast corner thereof, containing 11 acres, more or less. Denies that she is entitled to the possession thereof. Denies that she, said defendant, is the owner in fee-simple, or at all the owner, or is entitled to the possession of any part or parts of the land described in the complaint or answer herein.

And, for reply to the last separate defense of said defendant, Aurelia J. Barrell, plaintiff admits that said conveyance from Colburn and Aurelia J. Barrell, of date January 18th, 1877, was intended as a mortgage, but denies that said mortgage was payable in two years from the date thereof, and, on the contrary, alleges that the same was expressly made payable on or before March 7th, 1878, by a writing executed by said W. S. Ladd to Colburn Barrell on March
70 22d, 1877, in which and whereby the said Ladd did promise and agree that if the said Colburn Barrell, his heirs or assigns should, on or before the 7th day of March, A. D. 1878, pay to said Ladd, or his legal representatives, the sum of $3,883.17 in U. S. gold coin, with a sum equal to interest computed thereon from and after March 7th, 1877, together with all taxes paid by William S. Ladd on the land in the said writing and in the complaint herein described, with interest thereon at one per cent. per month, that then the said Ladd, or his legal representatives, would execute and deliver to said Colburn Barrell, or his assigns, a good deed of quitclaim and release of the right, title, and interest which the said Ladd had at the date of said agreement in and to the lands in said writing and in the complaint herein described; that time was especially made *of the* essence of said agreement, and it was provided therein that said agreement should be void and of non-effect in the event of said Colburn Barrell failing to pay said sums as aforesaid within

said time; that said writing was executed pursuant to an understanding had between said Ladd and defendants at the time of the execution to him of said mortgage; that said writing was accepted by said Colburn, for himself, and for said Aurelia Jane Barrell, acting in that behalf for her as her duly authorized agent; that said writing was made and executed at the request of said defendants, and was executed and delivered by said Ladd, and so accepted by said defendants, as a defeasance of said mortgage. Denies that said Ladd agreed to execute any other defeasance to these defendants, or either of them, either as alleged in the answer herein, or otherwise, or at all.

And, for further reply to said last separate defense, plaintiff says that the defendant, Aurelia J. Barrell, ought not to be permitted to allege or say the facts in said last separate defense stated, for that said William S. Ladd did heretofore, to wit, on the 4th day of December, A. D. 1879, and more than two years after the date of the said mortgage executed to him by the defendants herein, duly institute a suit in the circuit court of the State of Oregon, for Multnomah county, against said Colburn and Aurelia J. Barrell, for the purpose and object of having said deed declared to be a mortgage, and for a decree foreclosing the same and directing the sale of the premises in said mortgage and in the complaint herein described; that said defendants were each, and both of them, duly served with summons in said suit, and the defendant, Colburn Barrell, was duly served with a copy of the complaint in said suit, as by law required, and the said Colburn and Aurelia J. Barrell did duly appear in said court and cause and did answer make to the complaint of said Ladd in said suit; that such proceedings were thereafter in said cause and suit duly had that said court, then having jurisdiction of the parties and the subject-matter to and of said suit, *that* on the 22nd day of March, A. D. 1880, a final decree was duly made and entered in said court upon the merits of said suit, decreeing and declaring the said instrument executed by said Colburn and Aurelia J. Barrell to said William S. Ladd, on January 18th, 1877, to be a mortgage; that in said decree it was by said court found that the condition of said mortgage had been broken by the said defendants; and it was further decreed by said court in said cause that the said mortgage be, and the same was, in and by said decree, duly foreclosed, and did further decree and order the property in said decree and in the complaint herein described be sold in the manner in said decree directed.

71 And it was further in said court and cause decreed that the said Colburn Barrell and the said Aurelia J. Barrell, and each and both of them, and all persons claiming by, through, or under them, or either of them, be barred and foreclosed of all right, title, and interest in and to said property; that such further proceedings were thereupon had in said court and cause that an order of sale of said property, in pursuance of said decree, was, on the 23rd day of March, A. D. 1880, duly issued out of said court in said cause, directed to the sheriff of Multnomah county, Oregon, requiring him to sell the said property in said order of sale, decree, and in the complaint

herein described, in the manner in said decree and order of sale directed as upon execution; that said property was, by said sheriff, duly advertised for sale as by law directed, and upon the 25th day of March, 1880, the said sheriff did duly levy upon said property under and by virtue of said order of sale, and on the 24th day of April, A. D. 1880, the same and the whole whereof was, by said sheriff on said order of sale, and in the manner in said decree and order of sale directed, duly sold at public auction to said William S. Ladd; that the said defendant, Colburn Barrell, was present and did take part in and assist at said sale, both for himself and as the duly authorized agent of the defendant, Aurelia J. Barrell; that such proceedings were thereafter in said court and cause had that on June 15th, 1880, the said sale was by said court in all things confirmed, the said 15th day of June, 1880, being a day in the first next regular term of said court after said sale. And thereafter, to wit, on the 25th day of August, 1880, the said sheriff duly executed a deed to said property so sold and in the complaint herein described to said William S. Ladd; that no part of said property has been redeemed; that said decreee remains and is unappealed from and unreversed. And plaintiff alleges that all the facts in the last separate defense of defendant herein contained or mentioned were set forth and alleged by saidAurelia J. Barrell and Colburn Barrell in their answer in said suit in the circuit court of the State of Oregon for Multnomah county aforesaid. And plaintiff further alleges that he is the immediate grantee of said William S. Ladd and wife to said property in the complaint and answer herein alluded to and described.

Wherefore plaintiff prays judgment as in his complaint herein.

FECHHEIMER & ACH,
Att'ys for Pl'ff.

UNITED STATES OF AMERICA, }
District of Oregon, } *ss:*

I, Henry Ach, being first duly sworn, on oath say I am one of the attorneys for the plaintiff named in the foregoing reply; that plaintiff is not within this district, which is the reason why I make this affidavit; that the foregoing amended reply is true, as I verily believe.

HENRY ACH.

Subscribed and sworn to before me this 8th day of March, A. D. 1883.

[NOTARIAL SEAL.] PAUL R. DEADY,
Notary Public in and for Oregon.

Endorsed: "Engrossed amended reply. Filed March 8, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk."

72 And afterwards, to wit, on the 14 day of March, 1883, there was duly filed in said court a motion to strike out in words and figures as follows, to wit:

73 *Action to Secure the Possession of Real Property.*

In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

And now comes the defendant, Aurelia J. Barrell, by her attorney' and moves the court to strike out all that part of the plaintiff's engrossed amended reply to this defendant's last separate defense beginning on the 2d line of the fifth page and ending on the sixth line of said page, wherein it is alleged "that said writing was executed pursuant to an understanding had between said Ladd and defendants at the time of the execution to him of said mortgage," because the same is irrelevant and redundant.

And the said defendant, Aurelia J. Barrell, by her attorney, further moves the court that the plaintiff be required to make
74 more definite and certain that part of his said amended reply on lines 6, 7, 8, 9, 10, 11 of the fifth page, wherein it is alleged "that said writing was accepted by said Colburn, for himself and for said Aurelia Jane Barrell, acting in that behalf for her as her duly authorized agent," because it does not appear by said allegation whether he was her duly authorized agent or only professing to act as her duly authorized agent.

W. W. CHAPMAN,
Att'y for A. J. Barrell.

Endorsed: "Motion to strike out and make more definite engrossed reply. Filed March 14, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk."

75 And afterwards, to wit, on Monday, the 19 day of March, 1883, the same being the 87th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

76 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

MARCH 19, 1883.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. Henry Ach, of counsel, and the defendants, by Mr. W. W. Chapman, of counsel, and this cause comes on to be heard upon the motion of the defendant, Aurelia J. Barrell, to strike out part of and make more definite the plaintiff's engrossed amended reply to the answer of said defendant; and the court having heard the arguments of counsel, it is ordered, upon motion of plaintiff, that he be, and he hereby is, allowed to amend his said reply so as to show that

Colburn Barrell was the agent of Aurelia J. Barrell; and it is further ordered that the motion to strike out be, and the same hereby is, overruled.

77 And afterwards, to wit, on the 19 day of March, 1883, there was duly filed in said court an amended reply in words and figures as follows, to wit:

78 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

And now comes the plaintiff above named, and, pursuant to an order of the court, files the following amendment to the reply herein, said amendment to commence immediately after the word "agent," on the 11th line of the 5th page of the amended reply herein, to wit: That said Colburn Barrell was in that behalf the duly authorized agent of Aurelia Jane Barrell.

FECHHEIMER & ACH,
Att'ys for Pl'ff.

UNITED STATES OF AMERICA, }
District of Oregon, } *ss:*

I, Henry Ach, being first duly sworn, on oath say I am one of the attorneys for the plaintiff above named; that the allegation above set forth as an amendment to the reply herein in said cause is true, as I verily believe.

HENRY ACH.

Subscribed & sworn to before me this 19th day of March, 1883.
R. H. LAMSON, *Clerk,*
G. G. GAMMANS,
Deputy Clerk.

Endorsed: "Amended reply. Filed March 19, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk."

79 And afterwards, to wit, on the 21 day of May, 1883, there was duly filed in said court a schedule of title papers in words and figures as follows, to wit:

80 *Schedule of Title Papers.*

In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

1st. Deed. Colburn Barrell and Aurelia J. Barrell to W. S. Ladd; date, January 18th, 1877.

2d. Copies of pleadings, papers, &c., in case of W. S. Ladd *vs.* Colburn Barrell and Aurelia J. Barrell.
3d. Order of sale in same case.
4th. Sheriff's certificate of sale to W. S. Ladd.
5th. Confirmation of sale.
6th. Sheriff's deed to W. S. Ladd.
7th. Deed. W. S. Ladd and wife to C. E. Tilton.

FECHHEIMER & ACH,
Att'ys for Pl'ff.

Endorsed: "Schedule of title papers. Filed May 21, 1883. R. H. Lamson, clerk."

81 And afterwards, to wit, on Monday, the 21 day of May, 1883, the same being the 27th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

82 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

MAY 21, 1883.

Now, at this day, comes the plaintiff, by Mr. M. W. Fechheimer and Mr. Henry Ach, of counsel, and the defendants, by Mr. W. W. Chapman, of counsel; and now comes the following jury, viz., Albert Harrington, Joseph C. Polley, William Knott, Joseph Champaign, Benjamin Antrim, H. Gates, R. R. Riley, N. W. Randall, T. M. Hines, Martin Bisbee, William Collard, and Hardy Elliff, twelve good and lawful men of the district, who were duly empanelled and sworn to well and truly try the issue joined and a true verdict give according to the law and evidence.

83 And afterwards, to wit, on the 22 day of May, 1883, there was duly filed in said court a motion for judgment of nonsuit in words and figures as follows, to wit:

84 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

Action to recover the possession of real property.

And now come the defendants, by their attorney, and the plaintiff having rested, the defendants move the court for judgment of nonsuit upon the plaintiff's replication of estoppel for the following reasons:

1. The plea of estoppel alleges that the proceedings took place

with reference to the decree of the 22 of March, 1880, and that on that day the final decree was entered.

2. It does not allege or call to its aid any other decree.

3. The plea of estoppel of the decree of the 22d was not an amendment of the decree of the 19th of March, 1880, but that in itself was a complete and final decree.

4. Under the ruling of the court that the decree of the 22d is amendatory of the decree of the 19th, the plaintiff's plea of estoppel is not supported by the evidence.

W. W. CHAPMAN,
Defendants' Attorney.

Endorsed: "Motion for judgment of nonsuit. Filed May 22, 1883. R. H. Lamson, clerk. By G. G. Gammans, deputy."

85 And afterwards, to wit, on Tuesday, the 22 day of May, 1883, the same being the 28th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

86 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

MAY 22, 1883.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. M. W. Fechheimer and Mr. Henry Ach, of counsel, and the defendants, by Mr. W. W. Chapman, of counsel, and the jury empannelled herein being present and answering to their names, the trial of this cause proceeds; and the jury, having heard the evidence adduced, the arguments of counsel, and the instructions of the court, without retiring from the court-room, return the following verdict, viz:

"We, the jury in the above-entitled cause, do find for the plaintiff and that he is the owner in fee-simple of the property in the complaint described, and that he is entitled to the possession thereof.

"N. W. RANDALL, *Foreman.*"

Which verdict is received by the court and ordered to be filed.

86½ And after the introduction of the evidence herein the defendants moved for judgment of nonsuit; and the court having heard the arguments of counsel thereon, said motion was denied.

87 And afterwards, to wit, on the 22 day of May, 1883, there was duly filed in said court a verdict in words and figures as follows, to wit:

88 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

We, the jury in the above-entitled cause, do find for the plaintiff, and that he is the owner in fee-simple of the property in the complaint described, and that he is entitled to the possession thereof.

N. W. RANDALL, *Foreman.*

Endorsed: "Verdict. Filed May 22, 1883. R. H. Lamson, clerk."

89 And afterwards, to wit, on the 23 day of May, 1883, there was duly filed in said court a motion for judgment in words and figures as follows, to wit:

90 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

And now comes the plaintiff above named and moves the court for judgment upon the verdict of the jury herein and for execution thereon.

FECHHEIMER & ACH,
Att'ys for Pl'ff.

Endorsed: "Motion for judgment. Filed May 23, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk."

91 And afterwards, to wit, on Thursday, the 24 day of May, 1883, the same being the 30th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

92 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

MAY 24, 1883.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. Henry Ach, of counsel, and the defendants, by Mr. W. W. Chapman, of counsel, and said plaintiff moves for judgment upon the verdict heretofore rendered herein; whereupon it is ordered that said motion be, and the same is hereby, denied; and, upon motion of said defendants, it is ordered that further proceedings herein be stayed until the further order of the court.

93 And afterwards, to wit, on the 31 day of May, 1883, there was was duly filed in said court a motion for a new trial in words and figures as follows, to wit:

94 *Motion for a New Trial.*

In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,

vs.

COLBURN BARREL and AURELIA J. BARREL, His Wife, Defendants.

Action to recover the possession of real property.

And now comes the defendant, A. J. Barrell, by her attorney, and moves the court to set aside the verdict rendered in this action, and grant a new trial for the following reasons:

First. Insufficiency of evidence to justify the verdict.

(1.) No evidence was given or offered by the plaintiff that this defendant was in the wrongful possession, or in the possession at all, or wrongfully withheld the possession from this plaintiff.

(2.) No evidence was given or offered that this defendant
95 was in the joint possession of the premises, or any part thereof, and the verdict is against law.

Second. For errors in law occurring at the trial and excepted to by the defendant, A. J. Barrell:

(1.) The court erred in overruling this defendant's objections to the reading in evidence of the records embraced in the transcript marked "Exhibit No. 1" in the bill of exceptions.

(2.) The court erred in overruling this defendant's objections to the reading in evidence of the decree of the 22d March, 1880.

(3.) The court erred in overruling this defendant's objections to the reading in evidence the certified copy of the decree of the 22d of March, 1880, and order of sale thereto attached, signed by the clerk and directed to the sheriff, dated the 23d day of March, 1880, sheriff's return, certificate of sale, order of confirmation, and sheriff's deed.

96 (4.) The court erred in overruling this defendant's objections to the reading in evidence of the absolute deed of January 18, 1877.

(5.) The court erred in overruling this defendant's objections to the reading in evidence of the absolute deed by W. S. Ladd to the plaintiff.

(6.) The court erred in overruling defendants motion for judgment of nonsuit.

(7.) The court erred in instructing the jury that under the evidence submitted the plaintiff was entitled to recover as owner of the premises in fee-simple, and the duty of the jury to find accordingly, and instructing the jury to find the verdict presented by the court for their signatures.

W. W. CHAPMAN,
Defendants' Atto.

I certify that on this 31st day of May, 1883, I delivered to
97 plaintiff's attorney a true copy of the within motion.

W. W. CHAPMAN,
Def'ts' Atto.

Endorsed: Filed May 31, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

98 And afterwards, to wit, on the 31 day of May, 1883, there was duly filed in said court a motion of Colburn Barrel for a new trial in words and figures as follows, to wit:

99 *Motion of Colburn Barrel for a New Trial.*

In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARREL and A. J. BARRELL, His Wife, Defendants.

Action to recover the possession of real property.

And now comes the defendant, Colburn Barrel, by his attorney, and moves the court to set aside the verdict and grant a new trial upon the grounds:

First. The insufficiency of the evidence to justify the verdict.

(1.) In this: that this defendant pleaded separately, defending only for a portion of the premises and alleging tenancy of the remainder, and there was no evidence to show a joint possession or a joint withholding of possession, and a joint verdict is against law.

(2.) The deed of Colburn and Aurelia J. Barrell to W. S.
100 Ladd of the premises described in the complaint, of date January 18, 1877, is admitted in the pleadings and shown to be a mortgage, and there is no evidence of a foreclosure and sale according to law.

Second. Error in law occuring at the trial and accepted to by this defendant.

(1.) In this: that the court erred in overruling this defendant's objections to the reading of the transcript marked (Exhibit No. 1) and records therein embraced.

(2.) The court erred in permitting the decree of the 22d of March, 1880, to be read to the jury.

(3.) The court erred in instructing the jury to find a verdict for the plaintiff, and instructing the jury to find a joint verdict.

W. W. CHAPMAN,
Defendants' Atto.

I certify that on this day I delivered to the plaintiff's attorney a true copy of the within motion.

May 31, 1883.

W. W. CHAPMAN,
Deft's, Atto.

101 Endorsed: Filed May 31, 1883. R. H. Lamson, clerk, by G. G. Gammons, deputy clerk.

102 And afterwards, to wit, on Monday, the 4 day of June, 1883, the same being the 35th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

103 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

JUNE 4, 1883.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. M. W. Fechheimer, of counsel, and the defendants, by Mr. W. W. Chapman, of counsel, and, upon motion, it is ordered that the defendants' motion for a new trial herein be, and the same is hereby, set for hearing on Monday, June 11, 1883.

104 And afterwards, to wit, on Monday the 11 day of June 1883, the same being the 38th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

105 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

JUNE 11, 1883.

Now, at this day, it is ordered by the court, upon its own motion, that the former order given herein for the hearing of defendants' motion for a new trial be, and the same is hereby, set aside, and that said motion be, and the same is hereby, set for hearing when Mr. Justice Field shall be present.

106 And afterwards, to wit, on Tuesday, the 26 day of June, 1883, the same being the 45th judicial day of the regular April term of said court—present, the Honorable Stephen J. Field, circuit justice, presiding, and the Honorable Matthew P. Deady, United States district judge—the following proceedings were had in said case, to wit:

107 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARRELL *et al.* } No. 865.

JUNE 26, 1883.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. M. W. Fechheimer, of counsel, and the defendants, by Mr. W. W. Chapman, of counsel, and this cause comes on to be heard upon defendants' motion for a new trial herein; and the court having heard the arguments of counsel and now being fully advised in the premises, it is considered that the reasons given are insufficient grounds for a new trial herein. Wherefore it is ordered that said motion be, and the same is hereby, denied.

108 And afterwards, to wit, on the 12 day of July, 1883, there was duly filed in said court an opinion in words and figures as follows, to wit:

109 *Decision in U. S. Circuit Court.*

U. S. Circuit Court, District of Oregon.

CHARLES E. TILTON
vs.
COLBURN BARRELL and AURELIA J. BARREL. } No. 865.

Action to recover possession of real property.

TUESDAY, *June* 26, 1883.

(1) *Res-judicata.*—The decree of a competent court in a suit to enforce the right of the grantee against the grantors in an instrument admitted by both the plaintiff and defendants to have been intended to operate as a mortgage determines the rights of the parties thereto and thereunder, so that either they or their privies as against each other are estopped to say or allege aught to the contrary.

(2) *Final Decree—Modification of.*—During the term the court may modify, supplement, or supersede a final decree in any case, and while it is more orderly and convenient to state in the second decree how far or in what respect it is intended to affect the first one, still this is not actually necessary, and it will be presumed that in giving the second decree the court intended to modify the first one, in so far as they differ, unless the circumstances plainly indicate the contrary.

(3) *Decree and Execution Thereon.*—An execution directing the sale of mortgaged premises to satisfy the debt of the mortgagee must be based upon a decree, which is sufficiently indicated therein; but although there is a variance between the latter and the former as to the date of the decree the execution and sale thereon is valid, in favor of any person claiming thereunder, if it plainly

appears to the court, upon a view of all the facts, that the execution was in fact issued upon the decree in question and for its enforcement.

(4) *Two Similar Decrees in a Case.*—Two decrees purporting to be final were given in L. *v.* B., within three days of each other, directing the sale of mortgaged premises and differing only in the mode of describing the same, the first one describing them by parcels and the second one by the same parcels and as a whole: Held, that said decrees were in legal effect and operation identical, and an execution might properly issue upon either of them.

Motion for a New Trial.

Before Field, circuit justice, and Deady, district judge.

DEADY, *D. J.*, delivered the opinion of the court:

On November 29, 1882, Charles E. Tilton, a citizen of New York, brought this action against Colburn Barrell and his wife, Aurelia Jane, citizens of Oregon, to recover the possession of a tract of land situated in Multnomah county, containing 13¼ acres, and alleged to be worth $13,000.

Aurelia Jane demurred to the complaint, and on December 27, 1882, the demurrer was overruled. 14 Fed. Rep., 609.

The defendants afterwards answered separately, and to the new matter contained in these answers the plaintiff replied.

From the pleadings it appears that the plaintiff purchased the premises from William S. Ladd, a citizen of Oregon, who purchased them at a sheriff's sale upon a decree against the defendant's foreclosing a mortgage thereon, executed by them to said Ladd, and upon them the following issues arise: (1) As to the ownership and right to the possession of the premises, the plaintiff alleging that he is the owner of the same and entitled to the possession thereof, while the defendants deny such ownership, and allege, respectively, that Aurelia Jane is the owner of eleven acres of the premises, and Colburn of the remaining 2¼ acres, and entitled to the possession thereof. (2) As to legal effect of the conveyance of the premises to William S. Ladd by the defendants on January 17, 1877, the defendants alleging that the same was intended as a mortgage to secure the payment of $3,850 then due from said Colburn to Ladd in two years, with interest at one per cent. per month, and that Ladd agreed to give the defendants a writing to that effect, which promise, so far as Auralia Jane is concerned, he did not keep, but on March 22, 1877, executed a writing to said Colburn whereby he agreed to sell the whole of said premises to him, while the plaintiff alleges that he gave said Colburn, for himself and as agent of his wife, on said date, a writing, by which he agreed that if the sum due him was paid on or before March 7, 1878, but not afterwards, he would release and quit-claim the premises to said Colburn or his assigns. (3) As to whether the defendants are not estopped to allege any act concerning the execution of the conveyance of January 17, 1877, and the understanding or conduct of the parties about or concerning

it, the plaintiff alleging that on December 4, 1879, said Ladd brought a suit in the proper State circuit court against the defendants for the purpose of having said conveyance of January 17, 1877, declared a mortgage, and foreclosed accordingly; that the defendants were summoned, appeared, and answered the complaint in said suit, and that on March 22, 1880, said court made a final decree therein, declaring said conveyance to be a mortgage; that the defendants had broken the condition thereof, and that the premises be sold as therein directed; that on March 23 an order of sale issued out of said court to the sheriff, requiring him to sell the premises as upon an execution, upon which the same were duly sold to William S. Ladd on April 24, 1880, who afterwards, on August 25, 1880, and after the confirmation of said sale by said court, duly conveyed the premises to the plaintiff; and (4) as to whether the conveyance by Ladd to the plaintiff was collusive or not, the defendants alleging that it was made without consideration and for the purpose of enabling said Ladd to maintain an action in this court for the possession of the property in the name of the plaintiff, and upon the understanding that the same or the proceeds thereof should be returned to him, all of which the plaintiff denies.

The cause was tried by the district judge, with a jury, and the defendants admitting that the issue as to the collusive character of the conveyance to Ladd ought, upon the evidence, to be found against them, under the direction of the judge, a verdict was found for the plaintiff.

The defendants moved for a new trial and the motion was heard on June 26.

The grounds of the motion for a new trial are error of the court in the admission of the evidence and the instruction to the jury.

In the course of the trial the plaintiff offered in evidence a transcript of the proceedings in the State court in the case of Ladd *v.* Barrell *et ux.*, to which the defendants objected for various reasons, only one of which is pressed on the motion for [a] new trial. In this transcript there are two final decrees, the one given on March 19th and the other the 22d, and while the latter is pleaded in the replications as an estoppel the execution appears to refer by date to the former.

And, first, the rights of the parties to this conveyance or mortgage of January 17, 1877, and the writing of March 22, 1877, were direcly involved and determined in the suit of Ladd *v.* Barrell *et ux.* in the State court, and are now *res-judicata*. The defendants had their day in that court, and by their answer substantially admitted the claim of the plaintiff therein, and cannot now be heard to allege aught to the contrary of the determination based thereon.

But counsel for the defendants contend that as there is nothing in the transcript from which it expressly appears that the State court intended to vacate or modify the first decree, the second one is a nullity and does not support the estoppel set up in the replications, while if such decree is valid then the sale and conveyance to Ladd in pursuance of the first decree is void and of no effect.

But if the order of this argument is reversed, as it well may be,

the conclusion reached supports the allegation of title or ownership in the plaintiff and disproves the plea of title in the defendants, whatever may be the effect on the estoppel. Admit, then, if you please, that the second decree is void, as being made after the court had exhausted its power and jurisdiction over the subject, then the first decree is valid and the sale and conveyance to Ladd in pursuance of it is valid.

But we do not see any reason to think this second decree invalid. It was given at the same term as the first, and while the proceeding was still in the breast of the court and subject, in this respect, to its control and power. True it would have been more orderly and convenient in making the second decree to have referred to the first one and stated in what particular the latter was intended to modify, supplement, or supersede the former. But such a statement was not absolutely necessary. On the contrary, it is to be presumed that a second decree made within the term is intended to modify a former one just so far as it differs from it, either in breadth or length. Any other conclusion, unless under circumstances plainly indicating mistake or misapprehension, would be contrary to reason and common sense.

Nor is the objection that the sale appears to have been made on an execution issued on a decree of March 19th, instead of the 22nd, valid in this action. The process upon which this sale was made consists of a copy of the decree, followed by a writ in the nature of a *venditione exponas*, issued and signed by the clerk, and may be considered an execution within the purview of § 403 of the Code of C. P., providing for the enforcement of a decree in a suit in equity.

It is necessary, of course, that this execution should have a decree to support it, and that it should appear from the former what decree is intended to be enforced by it. But where sufficient — appears on the face of the execution to connect it with the decree—to indicate with reasonable certainty that the one is intended to enforce the other—courts usually disregard mere variances in the names of the parties, the date or the amount of the judgment or decree. Bissell *v.* Kip, 5 John., 100; Jackson *v.* Walker, 4 Wend., 462; Jackson *v.* Anderson, *Id.*, 478; Brown *v.* Betts, 13 Wend., 33; Freeman on Ex., sec. 43. The material question in this case is, Did the execution issue on this decree? And if, upon all the facts, it appears evident to the court that it did, the sale upon it ought to be regarded, so far, as valid.

Now, there is no doubt that this execution was issued upon and to enforce the final decree in the court in Ladd *v.* Barrell *et ux.* The marks of identity are the name of the court and the parties, the origin and amount of the indebtedness, to satisfy which the property was directed to be sold, the subject-matter of the sale—in short, every material circumstance contained in such decree, except the date, and that, all the authorities agree, is amendable, and should be disregarded in this action.

But in legal effect there is no difference in these two decrees of March 19 and 22, and the execution may have been well issued on either of them. The actual difference between them consists simply

in the fact that in the first decree the premises are described by parcels, seven in number, and in the second decree by said parcels and as a whole, the one being as exactly the equivalent of the other as 2 and 2 are of 4.

The entry of two final decrees in the case and the difference between them evidently arose in this way: At the request of counsel for the Barrells, the court sent the case to a referee to examine and report upon the propriety of a scheme of offering the property for sale in parcels, so as to enhance the proceeds thereof. The referee reported a scheme dividing the property into seven parcels, and the court directed it to be sold accordingly, upon the condition that after it had been offered in parcels if any — would bid more for it as a whole it should be knocked down to him, and the result was that it was sold to Mr. Ladd as a whole. But in the first decree the property was only described and bounded by the metes and bounds of these seven parcels, and the second decree was evidently entered out of an abundance of caution, so as to describe the premises by metes and bounds as a whole, as well as in parcels, and as a convenience for future use and direction in case it should be so offered and sold.

The motion for a new trial is denied.

M. W. Fechheimer, for the plaintiff; W. W. Chapman, for the defendants.

(Signed) MATTHEW P. DEADY,
U. District Judge, Oregon.

Endorsed: "Filed July 12, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

111 And afterwards, to wit, on Monday, the 9th day of July, 1883, the same being the 51st judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

112 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BARREL and AURELIA J. BARREL. } No. 865.

JULY 9, 1883.

The motion of the defendants for a new trial herein having been heretofore duly heard and denied, upon motion of plaintiff herein, by Mr. M. W. Fechheimer, for judgment upon the verdict of the jury herein rendered, it is considered that the plaintiff, C. E. Tilton, is the owner in fee-simple, and is as against the defendants, lawfully entitled to the possession of the following-described real property, to wit: All lying, situate, and being in the county of Multnomah, State of Oregon, and commencing one hundred and twenty (120) rods south and thirty-six (36) rods east of the northwest corner of the Selden Murray donation claim, in township one south, of range

one east, of the Willamette meridian; thence — fifty-seven and one-third ($57\frac{1}{3}$) rods; thence north sixty-eight and four-sevenths ($68\frac{4}{7}$) rods; thence west ninety-three and one-third ($93\frac{1}{3}$) rods; thence south one and four-sevenths ($1\frac{4}{7}$) rods; thence east ninety-two (92) rods; thence south (16) rods; thence west eighteen (18) rods; thence south twenty-five and six-elevenths ($25\frac{6}{11}$) rods; thence west thirty-eight (38) rods; thence south twenty-five and five-elevenths ($25\frac{5}{11}$) rods to the place of beginning, containing thirteen and one-fourth ($13\frac{1}{4}$) acres, more or less, and that he do have and recover the possession of the same from the defendants, and each of them, together with his costs and disbursements herein, taxed at—

113 And afterwards, to wit, on Monday, the 9th day of July, 1883, the same being the 51st judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

114 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON
vs.
COLBURN BURRELL *et al.* } No. 865.

JULY 9, 1883.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. M. W. Fechheimer, of counsel, and the defendants, by Mr. W. W. Chapman, of counsel, and this cause comes on to be heard upon defendants' motion for the court to fix the amount of the bond on the writ of error from the Supreme Court, and the court having heard the arguments of counsel, will advise thereof.

115 And afterwards, to wit, on the 10 day of July, 1883, there was duly filed in said court a cost bill in words and figures as follows, to wit:

116 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL *et al.*, Defendants. } No. 865.

Statement of disbursements claimed in the above-entitled cause, viz:

Clerk's fees	$37 90
Marshal's fees	6 10
Costs in lower court	
Advertising	
Depositions	
Attorney's fee	20 00
Attorney's fee for taking depositions, at $2.50 each	
Master's fees	
Referee's fees	

Disbursements:

Copies of papers in case of Ladd *vs.* Barrell, exection sheriff's deed, &c.	26 75
Atty's fees on plea to jurisdiction	5 00
" " motion to substitute	5 00
" " demurrer to complaint of A. J. Barrell	5 00
" " " " " both defendants	5 00
Total	$110 75
Plff's costs	110 75
Disallowed	15 00
	95 75
Costs of def't	20 00
Taxed at	75 75

R. H. LAMSON, *Clerk.*

116½ DISTRICT OF OREGON, *ss:*

I, Henry Ach, being duly sworn, say I am one of the attorneys for the plaintiff in the above-entitled cause; that the costs and disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that plaintiff is entitled to recover the same from the defendants.

Subscribed and sworn to before me this 10th day of July, 1883.
R. H. LAMSON, *Clerk.*

[Endorsed:] No. 865. In the circuit court of the United States for the district of Oregon. Cost bill. Filed July 10, 1883. R. H. Lamson, clerk.

117 *Exception [to] Plaintiff's Bill of Disbursements.*

In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON *vs.* COLBURN and A. J. BARRELL.

To charge of att'y's fees:

1. On plea to jurisdiction	5 00
2. " motion to substitute	5 00
3. " demurrer by both def'ts	5 00
	$15 00

W. W. CHAPMAN,
For Def'ts.

The above objections are sustained this July 11, 1883.
R. H. LAMSON, *Clerk.*

Endorsed: "Filed July 10, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy."

118 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL [and] A. J. BARRELL, Defendants.

The defendants, by W. W. Chapman, their attorney, claim of the plaintiff the following fees, under rule 59, sustaining motion to strike out:

1. Part of engrossed reply, March 14, '83	$5 00
2. Sustaining motion of Jan. 16	5 00
3. Sustaining motion of March 2, '83	5 00
4. Sustaining motion of Feb'y 17, '83	5 00
5. Overruling plaintiff's motion of Jan'y 29	5 00
	$25 00

W. W. CHAPMAN,
Def'ts' Att'y.

Items 1, 2, 3, & 5, amounting to $20, allowed July 11, 1883.
R. H. LAMSON, *Clerk.*

Endorsed: "Bill of defendants' fees on motions. Filed July 10, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy."

119 And afterwards, to wit, on the 14 day of July, 1883, there was duly filed in said court a bill of exceptions in words and figures as follows, to wit:

120 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

Action to recover the possession of real property.

Be it remembered that upon the trial of this cause the plaintiff offered in evidence what appears upon its face to be an absolute deed of warranty by the defendants, Colburn Barrell and Aurelia J. Barrell, his wife, to W. S. Ladd of the property described in the complaint, dated the 18th day of January, A. D. 1877; to the introduction of which the defendants objected because the same is admitted to have been intended as a mortgage; which objection the court overruled and admitted the same to be read in evidence, and to the ruling of the court the defendants excepted.

The plaintiff then offered in evidence a duly certified transcript of the record and proceedings of a suit in the circuit court of the State of Oregon, for Multnomah county, wherein W. S. Ladd is plaintiff and Colburn Barrell and Aurelia J. Barrell, his wife, are defendants, which said transcript embraces duly certified copies of the

complaint, endorsed "Filed December 4, 1879; summons and sheriff's return, filed December 9th, 1879; answer, filed December 16th, 1879; motion for judgment and decree upon the papers and pleadings, filed February 12, 1880; order of court taking said motion under advisement, filed February 14th, 1880; motion of Shattuck & Killen, as attorneys for defendants, for a modification of the decree and for an order directing the sale of the mortgaged premises in a particular manner, filed February 20, 1880; affidavit of Colburn Barrell, filed February 21, 1880; affidavit of W. S. Ladd, filed February 25th, 1880; order taking motion for modification under advisement of date March 6th, 1880; order referring the cause to W. B. Gilbert of date March 6th, 1880; referee's report, filed March 18th, 1880; order confirming referee's report; bill of disbursements, filed March 19th, 1880; decree and order that process issue to enforce it of date March 19th, 1880; second decree and order that process issue to enforce it of date March 22nd, 1880; which said transcript, embracing copies as aforesaid, is hereto attached, marked "Exhibit No. 1," and made a part of this bill of exceptions; to the introduction of which, and each and all of the copies therein embraced, the defendants each objected for the reasons following:

1. Said transcript is not properly endorsed.

2. The defendant, A. J. Barrell, claims that she was sued as the wife of Colburn Barrell; that the answer is not her answer; she did not sign it, and that the decree of the 22nd of March, 1880, if valid, does not bar her rights as mortgagor of her separate property as security for the debts of Colburn Barrell.

3. Because she claims that the record shows that a final decree in said suit was made and entered of record on the 19th day
121 of March, 1880, and signed by the judge, and remained of record, unmodified, vacated, or reversed, and claimed that all the proceedings prior thereto terminated in said decree, and the court had no jurisdiction to enter the second decree, though done in the same term of court, and the same is void and of no effect; which objections the court overruled, and to the rulings of the court the defendants excepted.

The plaintiff then offered in evidence a certified copy of the order of sale, with a copy of the decree of the 22nd March, 1880, thereto prefixed, signed by the clerk of Multnomah county and directed to the sheriff of said county, dated the 23d day of March, 1880, directing a sale under said decree, and sheriff's return thereon of the sale of the property in the said decree described; sheriff's certificate of sale to W. S. Ladd; order of confirmation of sale of the same to W. S. Ladd, dated the 15th day of June, 1880, a day in the next succeeding term of said court after said sale, and a copy of a deed by the then and former sheriffs of said county to W. S. Ladd of the said property of date the 25th day of August, 1880; to each and all of which the defendants each objected upon the grounds following:

1. Each and all of the said acts and proceedings set forth in said records were had, done, and performed under and by authority of the said decree of the 22nd of March, 1880, and are void and of no effect, and conferred no title, and the title of A. J. Barrell of her

separate property did not pass by said deed; which objections the court overruled, and to the ruling of the court the defendants each excepted.

The plaintiff then offered in evidence an original deed of said premises by W. S. Ladd and wife to the plaintiff, of date the 28th day of September, 1882; to the reading of which the defendants each objected, claiming that under the decree and proceedings beforementioned it passed no title, and that the said deed was executed collusively to give this court jurisdiction; which objections the court overruled, and to the ruling of the court the defendants excepted.

The plaintiff, having offered or given no other evidence, rested his case.

The defendants then moved the court for judgment of nonsuit, as per motion in said cause filed, which motion the court overruled and defendants excepted.

The defendants then offered in evidence a copy of the judgment lien docket of said State circuit court, showing that said decree of the 19th of March, 1880, duly docketed on the 19th day of March, 1880, which was admitted subject to the judgment of the court on its legal effect.

The defendant then rested his case, and no other evidence being given on either side, the court instructed the jury that the sheriff's deed conveyed the estate of the defendants in the premises in controversy to the grantee therein, William S. Ladd, and that the conveyance from said Ladd to the plaintiff vested the same in the latter, and, therefore, their verdict must be for the plaintiff; that he is the owner of the premises and entitled to the possession thereof as against the defendants; to which instruction the defendants, by their counsel, then and there excepted, and now pray that this their bill of exceptions to this and other rulings in the course of said trial, as hereinbefore set forth, may be allowed and signed, which is accordingly done.

June 19, 1883.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

122 EXHIBIT No. 1.

Summons.

In the Circuit Court of the State of Oregon for the County of Multnomah.

W. S. LADD, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, His Wife, Defendants.

To Colburn Barrell and Aurelia J. Barrell, the above-named defendants:

In the name of the State of Oregon you are hereby required to appear and answer the complaint filed against you in the above-entitled suit within ten days from the date of service of this summons upon you, if served within Multnomah county, or, if served

within any other county of this State, then within twenty days from the date of the service of this summons upon you, and if you fail so to answer, for the want thereof the plaintiff will apply to the court for the relief in said complaint demanded.

WHALLEY, FECHHEIMER & ACH,
Attorneys for Plaintiff.

STATE OF OREGON, } ss:
County of Multnomah, }

I hereby certify that I served the within summons within said State and county on the 8th day of Dec., 1879, on the within-named Aurelia J. Barrell by delivering a copy thereof, prepared and certified to by me as sheriff, to her in person.

B. L. NORDEN,
Sheriff of Multnomah County, Oregon,
By WM. CHURCH, JR., *Deputy.*

Endorsed: Filed Dec. 9th, 1879. James A. Smith, clerk, by A. J. Marshall, deputy.

Sheriff's Return.

STATE OF OREGON, } ss:
County of Multnomah, }

I certify that after diligent search for I was unable to find the within-named Colburn Barrell in this county. I therefore served the annexed summons within said State and county on the 8th day of December, 1879, on the within-named Colburn Barrell by delivering a copy thereof, prepared and certified to by me as sheriff, together with a copy of the complaint herein, prepared and certified to by James A. Smith, clerk of said county, on which said copy of complaint was endorsed in writing by plaintiff's att'ys direction to the sheriff to serve said copy on Colburn Barrell, to Mrs. Aurelia J. Barrell, a white person over the age of fourteen years, the wife and a member of said Colburn Barrell's family, at the residence or usual place of abode of the said Colburn Barrell, by delivering said copy to her in person.

B. L. NORDEN, *Sheriff,*
By WM. CHURCH, JR., *Deputy.*

123 In the Circuit Court of the State of Oregon for Multnomah County. In Equity.

WILLIAM S. LADD, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, His Wife, Defendants.

Plaintiff above named, complaining of the defendants above named, for cause of suit alleges:

That all the dates and times herein-mentioned defendants were and still are husband and wife.

That heretofore, on January 18th, A. D. 1877, said defendants, for and in consideration of the sum of $3,850.00 to them paid by the

plaintiff herein, made, executed, duly acknowledged, and delivered to plaintiff their, defendants', certain instrument, under seal, purporting and appearing to be upon its face *to be* an absolute deed of warranty to the following described real property, situate in Multnomah county, State of Oregon, to wit: That tract or parcel of land, situated in said county and State, commencing 120 rods south and 36 rods east of the northwest corner of the Seldon Murray donation claim, in township 1 south, of range 1 east, Willamette meridian; thence east 57½ rods; thence north 68¼ rods; thence west 93⅜ rods; thence south 1¼ rods; thence east 92 rods; thence south 16 rods; thence west 18 rods; thence south 25 6/11 rods; thence west 38 rods; thence south 25 5/11 rods to the place of beginning, containing thirteen and one-fourth acres, more or less, together with all tenements, hereditaments, and appurtenances thereto belonging.

That thereafter, to wit, on March 12th, 1877, the said instrument, under seal, was duly recorded on page 4 of Book 31 of records of deeds for Multnomah county, Oregon, by the clerk of said county.

That thereafter, to wit, on March 22d, 1877, the said William S. Ladd, in pursuance of an understanding and agreement made and entered into at the time of the execution and delivery of said instrument, under seal, hereinbefore mentioned, and for the consideration of one dollar to him paid by Colburn Barrell, he, said plaintiff herein, made, executed, duly acknowledged, and delivered to said Colburn Barrell his, said Ladd's, certain articles of agreement, in which and whereby he covenanted and agreed to and with said Barrell as follows, a copy of which agreement is for greater certainty herein set forth, to wit:

"Know all men by these presents that I, William S. Ladd, of Portland, county of Multnomah, State of Oregon, in consideration of one dollar to me in hand paid by Colburn Barrell, of said county and State, the receipt of which is hereby acknowledged, do hereby covenant and agree to and with the said Colburn Barrell, his heirs and assigns, that if the said Colburn Barrell, his heirs or assigns, shall on or before the 7th day of March, A. D. 1878, as the purchase price for the lands hereinafter described, pay to me or my legal representatives the sum of $3,883.17 in U. S. gold coin, together with a sum equal to interest computed thereon from and after the 7th day of March, A. D. 1877, together with all taxes paid by me, the said William S. Ladd, and interest on same at one per cent. per month in like coin, I will, or my legal representatives shall, execute and deliver unto said Colburn Barrell, or his assignees, a good deed of quit-claim and release of the right, title, and interest which at the date of these presents I have and own in and to the following described real estate, namely: That tract or parcel of land situated in Multnomah county, State of Oregon, commencing 120 rods south and
124 36 rods east of the northwest corner of the Seldon Murray donation claim, in township 1 south, of range 1 east, Willamette meridian; thence east 57½ rods; thence north 68¼ rods; thence west 93⅜ rods; thence south 1¼ rods; thence east 92 rods; thence south 16 rods; thence west 18 rods; thence south 25 6/11 rods; thence west 38 rods; thence south 25 5/11 rods, to the place of beginning, con-

taining thirteen and one-fourth acres, more or less, and that I will not from one year from the 7th day of March, A. D. 1867, do or suffer any act or thing in reference to said lands whereby the title or value of said lands so agreed to be conveyed shall be encumbered or affected; and I do further covenant and agree as aforesaid that, upon such payment of such purchase price, together with all taxes paid by me and interest on the same at one per cent. per month, all to be paid in U. S. gold coin, at the time specified, — as soon as can be reasonably done thereafter, to execute said conveyance upon the express understanding of the parties that time is of the essence of this contract, and this deed and contract shall become void and of no affect if said Colburn Barrell, his heirs or assigns, shall fail to pay the said sums as the purchase price of said lands within the time hereinbefore specified.

"In witness whereof I have hereto set my hand and seal on this the 22d of March, A. D. 1877.

"WILLIAM S. LADD. [SEAL.]

"Executed in presence of (the interlineation between 8th and 12th lines made before signing, to wit, "together with all taxes paid by me, the said Wm. S. Ladd, and interest on same")—

"(Signed) EDW. SHIPPERS.
"BENJAMIN A. KIMBALL.

"STATE OF PENNSYLVANIA, } ss:
"*City and County of Philadelphia,* }

"On this 22d day of March, A. D. 1877, before Edward Shippers, a commissioner of deeds for the State of Oregon, duly appointed, commissioned, and sworn, and residing at the city and county of Philadelphia, State aforesaid, personally appeared the above-named William S. Ladd, of Portland, Oregon, who is known to me to be the identical person described in and who executed the foregoing instrument, and he then and there duly acknowleged to me that he executed said instrument freely and voluntarily, and for the uses and purposes therein expressed.

"In witness whereof I have hereto set my hand and have affixed my official seal on the day and year in this certificate first above written.

"(Signed) EDW. SHIPPERS,
"*A. Com'r for Oregon.*

"Endorsed: Feb'y 15, '78. Received on ac. within the sum of four hundred and sixty-six dollars in U. S. gold coin $466."

And plaintiff alleges that although the said instrument, under seal, herein first mentioned was and is upon its face an absolute deed of warranty that it was by said defendants intended as a mortgage on the property therein described.

125 And plaintiff avers that the condition of said instrument as such mortgage is such that if the said Colburn Barrell should well and truly pay or cause to be paid on or before the 7th day of

March, 1878, to the said W. S. Ladd the sum of $3,883.17 in U. S. gold coin, together with a sum equal to interest computed thereon from and after March 7th, 1877, and all taxes which the said William S. Ladd should pay on said property, with interest thereon at one per cent. per month, then the said mortgage or instrument, under seal, thould be void and of no effect.

That the condition of said mortgage has been broken by defendants.

That the said principal sum hereinbefore mentioned and the interest thereon is long past due and owing.

That defendants have failed to pay the same, or any part thereof, save and except the interest thereon to March 7th, 1878.

That in the aggregate there is now past due and owing from the defendant, Colburn Barrell, to the plaintiff the sum of $3,883.17 and interest thereon at the rate of one per cent. per month from March 7th, 1878.

That no proceedings have been at law or otherwise for the recovery of the said amount due plaintiff.

That there [are] no prior or subsequent liens or incumbrances against or on the property hereinbefore described.

That plaintiff has no plain, adequate, or speedy remedy at law.

Wherefore plaintiff most respectfully prays that this honorable court will decree that the said instrument, under seal, may be as such mortgage foreclosed, and that the property therein described may be sold as upon execution, and the proceeds of such sale be applied as follows, to wit:

First. To the payment of the costs and disbursements of this suit and costs of sale and accruing costs.

Second. To the payment, as far as may be, of the said sum of $3,883.17 in U. S. gold coin to the plaintiff herein, with interest thereon at one per cent. per month from March 7th, 1878; and that the overplus, if any there be, be paid to the said defendant, Colburn Barrell, his heirs or assigns, or to the parties entitled thereto.

That this honorable court will further decree that said defendants herein be barred and foreclosed of all right and interest in said hereinbefore mortgaged and described real property, save and except of the statutory right to redeem, and for such other and further order and decree as may seem meet with equity and good conscience.

WHALLEY, FECHHEIMER & ACH,
Att'ys for Plaintiff.

STATE OF OREGON, }
County of Multnomah, } *ss.*:

I, W. S. Ladd, being first duly sworn, on oath say that I am the plaintiff named in the foregoing complaint; that said complaint is true, as I verily believe.

W. S. LADD.

Subscribed and sworn to before me this the 4th day of December, A. D. 1879.

[NOTARY'S SEAL.] J. E. BOYNTON,
Notary Public for Oregon.

(Endorsed:) Filed Dec. 4, 1879. James A. Smith, clerk, by A. J. Marshall, deputy.

126 *Answer of Colburn Barrell.*

In the Circuit Court of the State of Oregon for Multnomah County.
In Equity.

WILLIAM S. LADD, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, Defendants.

Title of case in court.

The above-named defendants, Colburn Barrell and Aurelia J. Barrell, his wife, come and answer the complaint herein and allege as follows: That it is true that we, Colburn Barrell and Aurelia J. Barrell, are husband and wife, and also true that the south ten acres and one hundred and forty rods and a fraction of a rod are the separate property of the wife; that we signed a certain paper, a deed on its face, she as security for me for the sum advanced by Mr. Ladd, which proved to be on the 7th day of March, 1877, the sum of $3,883.17, gold coin, on which sum we were to pay one per cent. per month interest for two years, or longer time if necessary, the object being to prevent the property being sold at a sacrifice, that I might pay my indebtedness out of the proceeds of part of the property, supposing that two years would be sufficient, if not a longer time was to be granted, that I might pay not only this sum, but a number of smaller debts of which he has a list, some of which I have since paid; that the form of the papers was as preferred by plaintiff. Having the fullest confidence in him and in Mr. Quackenbos, as his agent, I told him to do as he pleased, when he tried to explain to me the different ways of securing loans; that plaintiff himself, on his return from the East, told me to go home and go to work, he was going to save my place for me. I followed his advice to the extent of my strength and more; that the property is of much greater value than the amount of the indebtedness, and of very much greater prospective value, being on what must be in the future the main highway to East Portland from the East; that the paper I now hold, signed by Mr. Ladd in the East, and from which I find my indebtedness to him, I never saw till it returned from Philadelphia; that I told Mr. Quackenbos, his agent, the time was not as agreed; he said it would make no difference, it was only a form, and would be all right; that on that paper we paid $466 in Feb., 1878; that a like sum would have been paid in Feb., 1879, at about the same time in — month but for plaintiff appearing to want to obtain possession of the property as his own, though he said all he wanted was his money and interest; that $50 of the sum due plaintiff was for abstract and opinion; that the last I saw of the titles or papers showing the ownership of the property on which the opinion was formed they were in the hands of Mr. Whalley, one of plaintiff's attorneys; that when I called on him for them he told me that they were at the bank, if not there he did not know where they were; that, in my

opinion, this suit is unnecessary; that if a decree or judgment should be rendered that all my papers, claim of title, abstract, and opinion be returned to me, or if lost, a duly certified copy by county auditor of each and all of them that may have as much legal weight as original papers, and at plaintiff's expense; that if the property
127 comes to sale it may be sold in seven subdivisions such as we may name, and in such order as we may direct, viz., my part in two parcels, to be sold first; the wife's portion to be divided into five parcels, and no more of hers to be sold than is necessary to satisfy these claims, size and shape of the several pieces to be shown at time of trial in plat, and further reasons given.

Wherefore defendants pray judgment for their costs and expenses.

COLBURN BARRELL,
AURELIA J. BARRELL,
Defendants.

STATE OF OREGON, *Multnomah County:*

I, Colburn Barrell, one of the above-named defendants, being sworn, on oath say that I verily believe the foreging answer to be true.

COLBURN BARRELL.

Subscribed and sworn to before me this sixteenth day of December, in the year of our Lord eighteen hundred and seventy-nine.

JAMES A. SMITH, *Clerk.*

(Endorsed:) "Filed Dec. 16, 1879. James A. Smith, clerk."

Motion for Judgment and Decree.

In the Circuit of the State of Oregon for Multnomah County.

WILLIAM S. LADD, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, His Wife, Defendants.

And now comes the plaintiff herein, by his attorneys, Whalley and Fechheimer and Henry Ach, *his attorneys*, and, upon the papers and pleadings herein, moves the court for judgment and decree as prayed for in the complaint herein.

WHALLEY & FECHHEIMER AND
HENRY ACH,
Att'ys for Plaintiff.

(Endorsed:) "Filed Feb'y 12, 1880. James A. Smith, clerk, by A. J. Marshall, deputy."

128 *Order Taking Motion under Advisement.*

Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 9th day of February, A. D. 1880, the same being the second Monday in said month and the time fixed by

law for holding a regular term of said court—present, Hon. C. B. Bellinger, judge, presiding—whereupon a term of said court is begun and holden on Saturday, the 14th day of February, A. D. 1880, the same being the 6th judicial day of said term of said court, and, among other proceedings, the following was had, to wit:

W. S. LADD, Plaintiff,
vs.
COLBURN BARRELL *et al.*, Defendants.

At this time this cause comes on to be heard upon plaintiff's motion for judgment upon the pleadings; which said motion is submitted to the court without argument; and the court, not being fully advised in the premises, takes said motion under advisement.

(Signed) C. B. BELLINGER, *Judge.*

Motion to Modify Decree.

In the Circuit Court of the State of Oregon for Multnomah County.

W. S. LADD
vs.
COLBURN BARRELL and A. BARRELL.

The defendants come, by Shattuck and Killen, their attorneys, and move the court for a deduction from the interest claimed by plaintiffs and for the reduction of interest to ten per cent. per annum after maturity of said debt in the complaint mentioned, and for order directing the sale of the mortgaged premises in parcels to be designated by the decree, & for otherwise framing the decree according to law and equity.

SHATTUCK & KILLEN, *Att'ys.*

(Endorsed:) "Filed Feb'y 20, 1880. James A. Smith, clerk, by A. J. Marshall, deputy."

129 *Motion to Modify Decree.*

Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house in the city of Portland, in said county and State, on Monday the 9th day of February, A. D. 1880, the same being the second Monday in said month and the time fixed by law for holding a regular term of said court—present, Hon. C. B. Bellinger, judge, presiding—whereupon a term of said court is begun and holden on Saturday, the 6th day of March, A. D. 1880, the same being the 24th judicial day of said term of said court, and, among other proceedings, the following was had, to wit:

W. S. LADD, Plaintiff,
vs.
COLBURN BARRELL and A. J. BARRELL, His Wife, Defendants.

At this time this cause comes on to be heard upon the defendants' motion herein to modify the decree made in the above suit

the parties appearing—the plaintiff, by Mr. Henry Ach, of attorneys, and the defendants by Mr. E. D. Shattuck, their attorney. After hearing said motion and the argument of counsel, the court, not being fully advised in the premises, takes said motion under advisement.

(Signed) C. B. BELLINGER, *Judge.*

Affidavit of Colburn Barrell.

STATE OF OREGON, }
County of Multnomah, } *ss:*

In the Circuit Court of the State of Oregon for Multnomah County.
In Equity.

W. S. LADD, Pl'ff,
vs.
COLBURN BARRELL & A. J. BARRELL, Def'ts.

I, C. Barrell, being duly sworn, say I am one of the defendants. The land in controversy in this suit is susceptible of division into parcels, represented and described as in the diagram & notes herewith exhibited and made a part of this affidavit. The value of said land is about $10,000, and the security to the plaintiff is ample. I have had offers for parcels, to wit, for parcel numbered 4, $1,500; for parcels 4, 5, 6, & 7, $5,000; for twelve acres of the tract, $12,000; that since the execution of the instrument under which plaintiff claims I am unable to sell because plaintiff's mortgage covers the whole 7. I cannot get parcels released to suit purchasers, although I have been and am willing to have the entire proceeds of each parcel sold paid over to plaintiff until his debt shall be paid. It is difficult to find purchasers for the whole tract, but I am informed and believe that if the sale be made in parcels there will be
130 purchasers for such parcels as will make the full amount of plaintiff's debt and leave nearly half of the tract to these defendants. I was offered about a year ago for an amount equal to about parcels 2, 3, 4, 7, & 5 the sum of $8,500, but the trade was broken off by the death of a member of the family of the parties negotiating.

Said tract is the home of the defendants and their only property; they have improved it by orchards and cultivation, and deem it a hardship to be compelled to submit to a sale of the whole in a body unless the necessity of so doing in order to make plaintiff's debt be manifest. COLBURN BARRELL.

Subscribed and sworn to before me this 21 Feb'y, 1880.
JAMES A. SMITH, *Clerk,*
By A. J. MARSHALL, *Deputy.*

(Endorsed:) "Filed Feb'y 21, 1880. James A. Smith, clerk, by A. J. Marshall, deputy."

Diagram.

No. 1. Commence at a point 51⅞ rods south of the northwest corner of the Seldon Murray land claim, and on its western line, for a place of beginning; thence easterly 93⅓ rods; thence southerly 1¼ rods; thence westerly 93⅓ rods; thence northerly 1¼ rods to place of beginning, containing 146⅔ rods.

No. 2. Commence at a point 53 rods south and 92 rods east of the northwest corner of the Seldon Murray land claim, for a place of beginning; thence easterly 1⅓ rods; thence southerly 27 rods; thence westerly 19⅓ rods; thence northerly 11 rods; thence easterly 18 rods; thence northerly 16 rods, to place of beginning, containing 1 acre and 74 rods.

No. 3. Commence at a point 80 rods south and 74 rods easterly from the northwest corner of the Seldon Murray, for a place of beginning; thence easterly 19⅓ rods; thence southerly $14\frac{6}{11}$ rods; thence westerly 19⅓ rods, thence northerly $14\frac{6}{11}$ rods, to place of beginning, containing one acre, $121\frac{7}{11}$ rods.

No. 4. Commence at a point $94\frac{6}{11}$ rods south and 74 rods easterly of the northwest corner of the Seldon Murray land claim, for a place of beginning; thence easterly 19⅓ rods, thence southerly $25\frac{5}{11}$ rods; thence westerly 19⅓ rods; thence northerly $25\frac{5}{11}$ rods, to place of beginning, containing 3 acres, $12\frac{4}{33}$ rods.

No. 5. Commence at a point $94\frac{6}{11}$ rods south and 40 rods east of the northwest corner of the Seldon Murray land claim, for a place of beginning; thence easterly 16 rods; thence southerly $25\frac{5}{11}$ rods; thence westerly 16 rods; thence northerly $25\frac{5}{11}$ rods, to place of beginning, containing 2 acres, $87\frac{3}{11}$ rods.

No. 6. Commence at a point $94\frac{6}{11}$ rods south and 36 rods east of the northwest corner of the Seldon Murray land claim, for a place of beginning; thence easterly 4 rods; thence southerly $25\frac{5}{11}$ rods; thence westerly 4 rods; thence northerly to place of beginning, containing $109\frac{9}{11}$ rods.

No. 7. Commence at a point $94\frac{6}{11}$ rods south and 56 rods east of the northwest corner of the Seldon Murray land claim, for a place —; thence easterly 18rods; thence southerly $25\frac{5}{11}$ rods; thence westerly 18 rods; thence northerly $25\frac{5}{11}$ rods, to place of beginning, containing 2 acres, $138\frac{2}{11}$ rods.

(Here follows diagram marked p. 131.)

132 *Affidavit of W. S. Ladd.*

STATE OF OREGON, }
County of Multnomah, } *ss:*

In the Circuit Court of the State of Oregon for *the State of Oregon.*

W. S. LADD, Plaintiff,

vs.

COLBURN BARRELL and AURELIA J. BARRELL, His Wife, Defendants.

I, W. S. Ladd, being first duly sworn, on oath say as follows: That the property described in the pleadings herein, and heretofore by the

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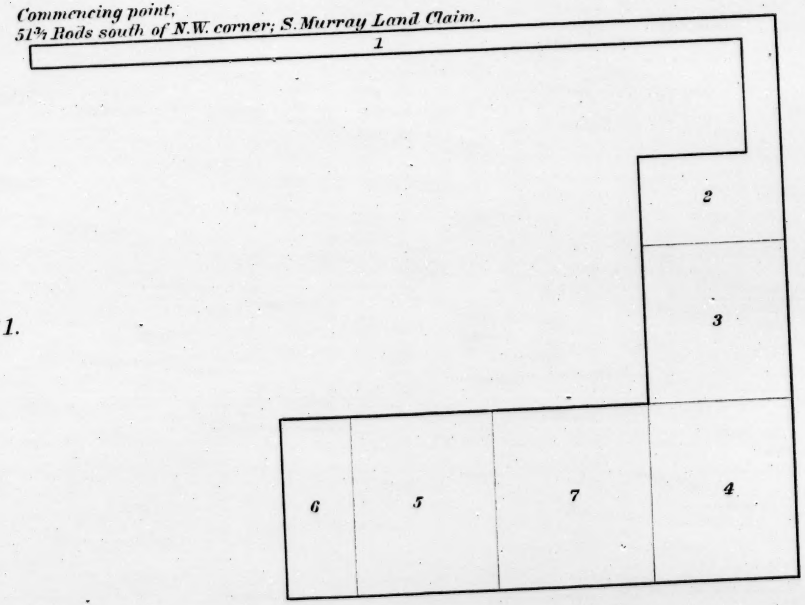
Barrell

vs.

Tilton.

} p. 131.



court decreed to be sold, in the aggregate contains but about 11 acres and 40 rods; that I deem that it would be of great injury to me to divide said property in small parcels, as designated in the defendant's affidavit; that no survey has been had of said premises; that said property is assessed in this county for $2,000.00; that the amount due on my mortgage is largely in excess of said assessed value of said property; that it is not true that I would not release parts of said property so that the defendant could effect a sale thereof, but, on the contrary, I have assisted def't in his attempts to make sale; that said def't holds the said property at a figure largely in excess of its real value; that purchasers, in affiant's opinion, could be found for the whole of the mortgage property; that it would be to the best interest, both of the pl'ff and def'ts, to sell the said mortgage property as a whole.

W. S. LADD.

Subscribed and sworn to before me this the 24th day of February, A. D. 1880.

[NOTARIAL SEAL.] J. E. BOYNTON,
Notary Public in and for Oregon.

(Endorsed:) "Filed Feb'y 25th, 1880. James A. Smith, clerk, by A. J. Marshall, deputy."

Order of Reference.

Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 9th day of February, A. D. 1880, the same being the second Monday in said month, and the time fixed by law for holding a regular term of said court—present, Hon. C. B. Bellinger, judge, presiding—whereupon a term of said court is begun and holden on Monday, the 8th day of March, A. D. 1880, the same being the 25th judicial term of said court, and, among other proceedings, the following was had, to wit:

133 W. S. LADD, Plaintiff, *vs.* C. BARRELL *et ux*, Defendants.

The motion to modify the decree herein having been heretofore argued and submitted to the court, it is at this time ordered by the court that said cause be, and it is hereby, referred to W. B. Gilbert, Esq., to take testimony and report the facts to this court.

(Signed) C. B. BELLINGER, *Judge.*

Referee's Report.

WILLIAM S. LADD, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, His Wife, Defendants.

To the Honorable C. B. Bellinger, judge of the above-entitled court:

I, the undersigned referee, to whom said cause was referred to report upon a decree therein as to the manner in which the mort-

gaged premises in the above-entitled suit should be offered for sale, would respectfully submit the following, my report thereupon:

That upon the 18th day of March, 1880, at ten o'clock a. m., before me appeared the plaintiff, by Henry Ach, Esq., his attorney, and the defendant in person, the defendant producing a plat of said premises; the said matter was thereupon submitted. Upon consideration thereof, I find that the decree in said cause directing the sale of said premises should be as follows, in accordance with request of defendants: That said mortgaged premises be first offered for sale by the sheriff in parcels, seven in number, as hereinafter described, and in the order to be designated by the defendant on the day of sale; none of said parcels to be struck off and sold absolutely until enough be realized therefrom to satisfy the said mortgage debt and costs and costs of sale, and if the sum total of such bids so received for said parcels be insufficient to satisfy the said debt and costs, then the whole of said premises to be offered for sale in one entire tract, and if a bid is offered for such entire tract in amount to exceed the sum total of the bids upon said parcels, then the said premises to be struck off and sold in one entire tract to such bidder; otherwise, to be struck off and sold to the respective bidders upon said parcels. The said subdivisions are described as follows:

No. One. Commencing 120 rods south and 36 rods east of the northwest corner of the Seldon Murray donation claim, in township 1 south, of range 1 east, Willamette meridian, in Multnomah county, Oregon; thence east 4 rods; thence north $25\frac{5}{11}$ rods; thence west 4 rods; thence south to the place of beginning.

No. Two. Commencing at the place of beginning of tract No. one, above described; thence east 20 rods; thence north $25\frac{5}{11}$ rods; thence west 16 rods; thence south $25\frac{5}{11}$ rods to the south boundary line of said premises.

134 No three. Commencing at the place of beginning of said tract No. one, thence east 38 rods; thence north $25\frac{5}{11}$ rods; thence west 18 rods; thence south $25\frac{5}{11}$ rods, to the south boundary line of said premises.

No. four. Commencing at the place of beginning of tract No. one, above described, thence east $57\frac{1}{3}$ rods; thence north $25\frac{5}{11}$ rods; thence — $19\frac{1}{3}$ rods; thence south to the south boundary line of said premises $25\frac{5}{11}$ rods.

No. five. Commencing at the place of beginning of tract No. one, above described, thence east $57\frac{1}{3}$ rods; thence north 40 rods; thence west $19\frac{1}{3}$ rods; thence south $14\frac{6}{11}$ rods; thence east $19\frac{1}{3}$ rods to the eastern boundary line of said tract.

No. six. Commencing [at] the place of beginning of tract No. one, above described, thence $57\frac{1}{3}$ rods; thence north 67 rods; thence west $1\frac{1}{3}$ rods; thence south 16 rods; thence west 18 rods; thence south 11 rods; thence $19\frac{1}{3}$ rods to the east boundary line of said mortgaged premises.

No. seven. Commencing at the place of beginning of said tract No. one, above described, thence east $57\frac{1}{3}$ rods; thence north $68\frac{4}{7}$ rods; thence west along the northernmost boundary line of said

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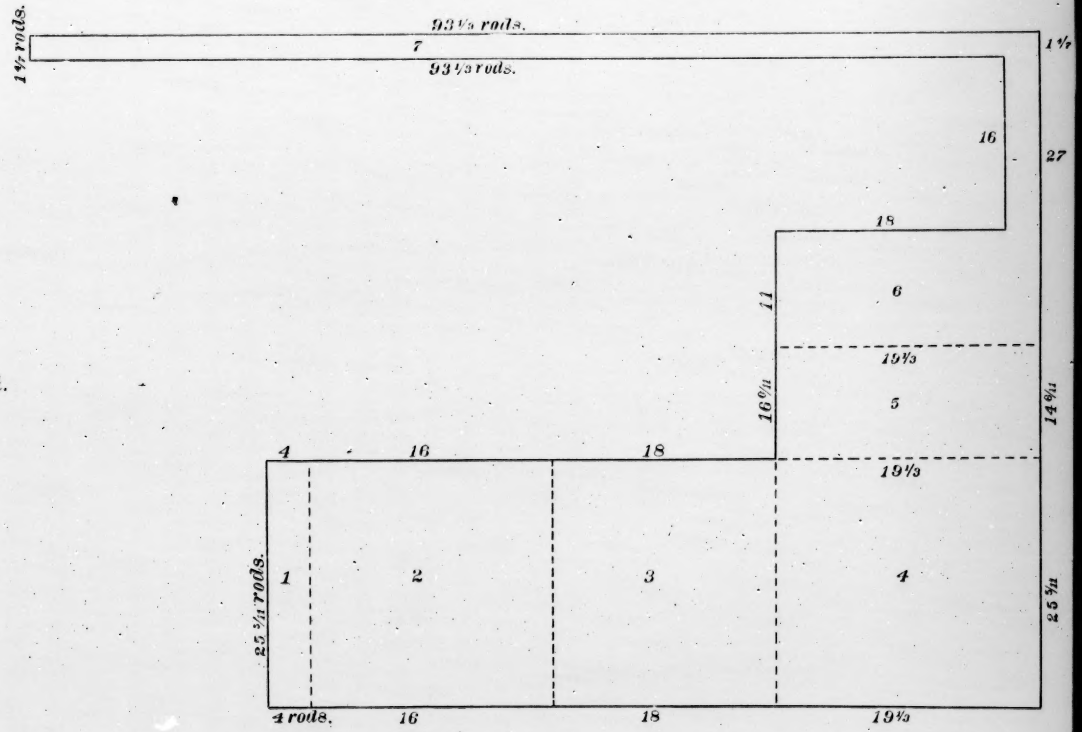
Barrell

vs.

Tilton.

} *p. 134.*



mortgaged premises 93⅓ rods; thence south 1¼ rods; thence east 93⅓ rods to the east boundary line of said mortgaged premises,

(Here follows diagram marked p. 134.)

said parcels being designated and described in the plat above.

All of which is respectfully submitted.

W. B. GILBERT, *Referee.*

(Endorsed:) Filed March 18, 1880. James A. Smith, clerk.

135 *Order Confirming Report.*

Be it remembered that at the regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 9th day of February, A. D. 1880, the same being the second Monday in said month and the time fixed by law for holding a regular term of said court—present, Hon. C. B. Bellinger, judge, presiding—whereupon a term of said court is begun and holden on Friday, the 19th day of March, A. D. 1880, the same being the 35th judicial day of said term of said court, and, among other proceedings, the following was had, to wit:

WILLIAM S. LADD, Plaintiff,

vs.

COLBURN BARRELL and AURELIA J. BARRELL, His Wife, Defendants.

On motion of plaintiff herein, it is hereby ordered and adjudged that the report of the referee as to the form of the decree herein be, and the same hereby is, confirmed.

(Signed) C. B. BELLINGER, *Judge.*

Cost Bill.

In the Circuit Court for the County of Multnomah, State of Oregon.

WILLIAM S. LADD, Plaintiff,

vs.

COLBURN BARRELL and AURELIA J. BARRELL, His Wife, Defendants.

Statement of disbursements claimed in the above-entitled cause, viz:

Clerk's fees	
Sheriff's fees	$2 75
Trial fees	6 00
Depositions, Ladd, W. S.	50
Attorney's fee	10 00
Referee's fees	8 00
Disbursements—swearing to complaint before notary	50

COUNTY OF MULTNOMAH, *ss:*

I, Henry Ach, being duly sworn, say I am one of the att'ys for pl'ff in the above-entitled cause; that the disbursements set forth above have

been necessarily incurred in the prosecution of this suit, and that pl'ff [is] entitled to recover the same from the defendants.

HENRY ACH.

Subscribed and sworn to before me this 19th day of March, A. D. 1880.

JAMES A. SMITH, *Clerk*,
By A. E. BORTHWICK, *Deputy*.

(Endorsed: "Filed March 19, 1880. James A. Smith, clerk, by A. E. Borthwick, deputy."

136 *Decree.*

Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 9th day of February, A. D. 1880, the same being the second Monday in said month and the time fixed by law for holding a regular term of said court—present, Hon. C. B. Bellinger, judge, presiding—whereupon a term of said court is begun and holden on Friday, the 19th day of March, A. D. 1880, the same being the 35th judicial day of said term of said court, and, among other proceedings, the following was had, to wit:

W. S. LADD, Plaintiff,
vs.
COLBURN BARRELL and AURELIA J. BARRELL, His Wife, Defendants.

Now, at this day, comes on to be heard the above-entitled matter upon the motion of the plaintiff herein heretofore made upon the papers and pleadings herein for decree and judgment as prayed for in the complaint herein, and the court having heretofore taken the said motion under advisement, and now being fully advised in the premises, and it appearing that said instrument under seal mentioned in the complaint herein as an instrument under seal and appearing and purporting upon its face to be an absolute deed of warranty, was intended by the defendant herein as a mortgage upon the property therein in said instrument and in the complaint described to secure to plaintiff by defendant, Colburn Barrell, of the sum of $3,883.17 in U. S. gold coin, on or before March 7th, 1878, together with a sum equal to interest computed thereon from and after March 7th, 1877, at one per cent. per month; and it further appearing that said defendants have failed to pay said sum, either principal or interest, or any part thereof, save and except the interest thereon to March 7th, 1878; and it appearing that the said sum is long past due and owing; and it further appearing that the condition of said mortgage, as alleged in the complaint herein, has been broken by said defendant, Colburn Barrell; and it further appearing that there is now past due and owing thereon from defendant, Colburn Barrell, to this plaintiff the sum of $3,883.17 in U. S. gold coin and interest thereon from March 7th, 1878, at the rate of one per cent. per month, and that no proceedings have been had at law or other-

wise for the recovery of said sum, and that plaintiff has no plain, adequate, or speedy remedy at law, and this court now having jurisdiction of the subject matter and persons in this suit, it is hereby ordered, adjudged, and decreed that said instrument under seal mentioned and described in the complaint herein as an instrument under seal and appearing and purporting on its face to be an absolute deed of warranty be, and the same is, declared a mortgage; and it is hereby further ordered, adjudged, and decreed that the said mortgage be, and the same hereby is, foreclosed; that the property therein described be sold in the manner and according to the report of the referee herein, now on file—that is to say, that said mortgaged premises be first offered for sale by the sheriff in parcels, seven in number, as hereinafter described, and in the order to be designated by the defendant on the day of sale, none of said parcels to be struck off and sold absolutely until enough
137 be realized therefrom to satisfy the said mortgage debt and costs and costs of sale, and if the sum total of such bids so received for said parcels be insufficient to satisfy the said debt and costs, then the whole of said premises to be offered for sale in one entire tract, and if a bid is offered for such entire tract in amount to exceed the sum total of the bids upon said parcels, then the said premises to be struck off and sold in one entire tract to such bidder; otherwise to be struck off and sold to the respective bidders upon said parcels. The said subdivisions are described as follows:

No. one. Commencing 120 rods south and 36 rods east of the northwest corner of the Selden Murray Donation Land Claim, in township one south of range 1 east, Willamette meridian, in Multnomah county, Oregon; thence east 4 rods: thence north $25\frac{5}{11}$ rods; thence west 4 rods; thence south to the place of beginning.

No. two. Commencing at the place of beginning of tract no one, above described; thence east 20 rods; thence north $25\frac{5}{11}$ rods; thence west 16 rods; thence south $25\frac{5}{11}$ rods to the south boundary line of said premises.

No. three. Commencing at the place of beginning of said tract No. one; thence east 38 rods; thence north $25\frac{5}{11}$ rods; thence west 18 rods; thence south $25\frac{5}{11}$ rods to the south boundary line of said premises.

No. four. Commencing at the place of beginning of tract No. one, above described; thence east $57\frac{1}{3}$ rods; thence north $25\frac{5}{11}$ rods; thence west $19\frac{1}{3}$ rods; thence south to the south boundary line of said premises $25\frac{5}{11}$ rods.

No. five. Commencing at the place of beginning of tract No. one above described; thence east $57\frac{1}{3}$ rods; thence north 40 rods; thence west $19\frac{1}{3}$ rods; thence south $14\frac{6}{11}$ rods; thence east $19\frac{1}{3}$ rods, to the east boundary line of said tract.

No. six. Commencing at the place of beginning of tract No. one, above described; thence east $57\frac{1}{3}$ rods; thence north 67 rods; thence west $1\frac{1}{3}$ rods; thence south 16 rods; thence west 18 rods; thence south 11 rods; thence east $19\frac{1}{3}$ rods, to the east boundary line of said mortgaged premises.

No. seven. Commencing at the place of beginning of said tract

No. one, above described; thence east 57⅓ rods; thence north 68⅔ rods; thence west along the northernmost boundary line of said mortgaged premises 93⅓ rods; thence south 1⅔ rods; thence east 93⅓ rods, to the east boundary line of said mortgaged premises.

That the proceeds of said sale be applied to the payment of—

First. The costs and disbursements of this suit, taxed at $—, and costs of sale and accruing costs.

Second. To the payment to plaintiff, as far as may be, of the sum of $3,383.17 in U. S. gold coin, with interest thereon at the rate of one per cent. per month from and after March 7th, 1878, and the overplus, if any there be, paid upon an order of court to the party or parties entitled thereto.

And it is hereby further ordered, adjudged, and decreed that said defendants, and each and both of them, and all persons claiming by, through, or under them, or either of them, be, and they hereby are, barred and foreclosed of all right, interest, and equity in said mortgaged premises, save and except of their statutory right to redeem; and that process issue to enforce this decree.

(Signed) C. B. BELLINGER, *Judge.*

138 *Second Decree.*

Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 9th day of February, A. D. 1880, the same being the second Monday in said month and the time fixed by law for holding a regular term of said court—present, Hon. C. B. Bellinger, judge, presiding—whereupon a term of said court is begun and holden on Monday, the 22d day of March, A. D. 1880, the same being the 37th judicial day of said term of said court, and, among other proceedings, the following was had, to wit:

W. S. LADD, Plaintiff,

vs.

COLBURN BARRELL and AURELIA J. BARRELL, His Wife, Defendants.

Now, on this day, comes on to be heard the above-entitled matter, upon the motion of the plaintiff herein heretofore made upon the papers and pleadings herein, for decree and judgment as prayed for in the complaint herein; and the court having heretofore taken the said motion under advisement, and being now fully advised in the premises, and it appearing that the said instrument under seal mentioned in the complaint herein as an instrument under seal, and appearing and purporting to be upon its face an absolute deed of warranty, was intended by the defendant herein as a mortgage upon the property therein, in said instrument and in the complaint described, to secure to plaintiff the payment by defendant, Colburn Barrell, of the sum of $3,883.17 in U. S. gold coin on or before March 7th, 1878, together with a sum equal to the interest computed thereon from and after March 7th, A. D. 1877, at one per cent. per month; and it further appearing that said defendants have failed to pay said

sum, either principal or interest, or any part thereof, save and except the interest thereon to March 7th, 1878, and it appearing that the said sum is long past due and owing, and it further appearing that the condition of said mortgage, as alleged in the complaint herein, has been broken by said defendant, Colburn Barrell, and it further appearing that there is now past due and owing thereon from the defendant, Colburn Barrell, to this plaintiff the sum of $3,883.17 in U. S. gold coin and interest from March 7th, 1878, at the rate of one per cent. per month, and that no proceedings have been had at law or otherwise for the recovery of said sum, and that plaintiff has no plain, speedy, or adequate remedy at law, and that this court now having jurisdiction of the subject-matter and persons in this suit, it is hereby ordered, adjudged, and decreed that said instrument under seal, mentioned and described in the complaint herein as an instrument under seal appearing and purporting upon its face to be an absolute deed of warranty, be, and the same is, declared a mortgage; and it is hereby adjudged, ordered, and decreed that the said mortgage be, and the same hereby is, foreclosed; that the property therein, as follows: That tract or parcel of land situated in said county of Multnomah and State of Oregon, commencing 120 rods south and 36 rods east of the northwest corner of the Selden Murray donation claim, in township 1 south, of range 1 east, Willamette meridian; thence east $57\frac{1}{3}$ rods; thence north $68\frac{1}{7}$ rods; thence west $93\frac{1}{3}$ rods; thence south $1\frac{1}{7}$ [rods]; thence east
139 92 rods; thence south 16 rods; thence west 18 rods; thence south $25\frac{6}{11}$ rods; thence west 38 rods; thence south $25\frac{5}{11}$ rods, to the place of beginning, containing thirteen and one-fourth acres, more or less, together with all the tenements, hereditaments, and appurtenances thereunto belonging, be sold in the manner and according to the report of the referee herein now on file—that is to say, that said mortgaged premises be first offered for sale by the sheriff in parcels, seven number, as hereinafter described, and in the order to be designated by the defendant on the day of sale, none of said parcels to be struck off and sold absolutely until enough be realized therefrom to satisfy the said mortgaged debt and costs, and costs of sale, and if the sum total of such bids so received for said parcels be insufficient to satisfy the said debt and costs, then the whole of said premises to be offered for sale in one entire tract, and if a bid is offered for such entire tract in amount to exceed the sum total of the bids upon said parcels, then the said premises to be struck off and sold in one entire tract to such bidder; otherwise to be struck off and sold to the respective bidders upon said parcels. The said subdivisions are described as follows:

No. one. Commencing 120 rods south and 36 rods east of the northwest corner of Selden Murray donation claim, township one south of range 1 east, Willamette meridian, in Multnomah county, Oregon, thence east 4 rods; thence north $25\frac{5}{11}$ rods; thence west 4 rods; thence south to the place of beginning.

No. two. Commencing at tract No. one, above described, thence east 20 rods; thence north $25\frac{5}{11}$ rods; thence west 16 rods; thence $25\frac{5}{11}$ rods to the south boundary line of said premises.

No. three. Commencing at the place of beginning of said tract No. one, thence east 38 rods; thence north $25\frac{5}{11}$ [rods]; thence west 18 rods; thence south $25\frac{5}{11}$ rods to the south boundary line of said premises.

No. four. Commencing at the place of beginning of the tract No. one, above described, thence east $57\frac{1}{3}$ rods; thence north $25\frac{5}{11}$ rods; thence west $19\frac{1}{3}$ rods; thence south to the south boundary line of said premises $25\frac{5}{11}$ rods.

No. five. Commencing at the place of beginning of tract No. one, above described, thence east $57\frac{1}{3}$ rods; thence north 4 rods; thence west $19\frac{1}{3}$ rods; thence south $14\frac{6}{11}$ rods; thence east $19\frac{1}{3}$ rods to the boundary line of said tract.

No. six. Commencing at the place of beginning of said tract No. one, above described, thence east 67 rods; thence north 67 rods; thence west $1\frac{1}{3}$ rods; thence south 16 rods; thence west 18 rods; thence south 11 rods; thence east $19\frac{1}{3}$ rods to the east boundary line of said mortgaged premises.

No. seven. Commencing at the place of beginning of said tract No. one, above described, thence east $57\frac{1}{3}$ rods; thence north $68\frac{4}{7}$ rods; thence west along the northwest boundary line of said mortgaged premises $93\frac{1}{3}$ rods; thence south $1\frac{4}{7}$ rods; thence east $93\frac{1}{3}$ rods to the east boundary line of said mortgaged premises.

That the proceeds of said sale be applied to the payment of—

First. The costs and disbursements of this suit, taxed at $—, and costs of sale and accruing costs.

140 Second. To the payment to plaintiff, as far as may be, of the sum of $3,883.17 in U. S. gold coin, with interest thereon at the rate of one per cent. per month from and after March 7th, 1878, and the overplus, if any there be, be paid on order of court to the party or parties entitled thereto. And it is hereby ordered, adjudged, and decreed that said defendants, and each of and both of them, and all persons claiming by, through, or under them, or either of them, be, and they hereby are, barred and foreclosed of all right, interest, and equity in said mortgaged premises, save and except of their statutory right to redeem, and that process issue to enforce this decree.

(Signed) C. B. BELLINGER, *Judge.*

(Endorsed:) "Bill of exceptions and Exhibit No. 1." "Filed July 14, 1883. R. H. Lamson, clerk."

141 And afterwards, to wit, on the 16 day of July, 1883, there was issued out of the Supreme Court of the United States a writ of error in words and figures as follows, to wit:

142 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

C. E. TILTON
vs.
COLBURN BARRELL and AURELIA J. BARRELL. } No. —.

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the Honorable Matthew P. Deady, one of you, between C. E. Tilton, plaintiff and defendant in error, and Colburn Barrell and Aurelia J. Barrell, defendants and plaintiffs in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-three, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this July 16, 1883.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON,
Clerk of the Circuit Court of the United States
for the District of Oregon,
By G. G. GAMMANS,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. C. E. Tilton *ads.* Colburn Barrell & Aurelia J. Barrell. Writ of Error. Filed July 16, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

143 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

C. E. TILTON
vs.
COLBURN BARRELL and AURELIA J. BARRELL. } No. —.

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the Honorable Matthew P. Deady, one of you, between C. E. Tilton, plaintiff and defendant in error, and Colburn Barrell and Aurelia J. Barrell, defendants and plaintiffs in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-three, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this July 16, 1883.

[Seal of Circuit Court of United States for Dist. of Oregon.]

(Signed) R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By G. G. GAMMANS,
Deputy Clerk.

143½ [Endorsed:] In the Supreme Court of the United States. C. E. Tilton *vs.* Colburn Barrell & Aurelia J. Barrel. Writ of error. Original endorsed: Filed July 16, 1883. (S'g'd) R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

144 And afterwards, to wit, on the 16 day of July, 1883, there was duly filed in said court a bond in words and figures as follows, to wit:

145 In the Circuit Court of the United States for the District of Oregon.

C. E. TILTON *vs.* COLBURN BARRELL & AURELIA J. BARRELL.

Know all men by these presents that we, Colburn Barrell and Aurelia J. Barrell, as principals, and W. H. Harris and Levi Anderson, as sureties, are held and firmly bound unto C. E. Tilton in the sum of thirteen hundred and fifty dollars, to be paid to the said C. E. Tilton, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this 16th day of July, 1883.

Whereas the the above-named Colburn Barrell and Aurelia J. Barrell have sued out a writ of error from the Supreme Court of the United States to reverse the judgment in the above-entitled cause by circuit court of the United States for the district of Oregon:

Now, therefore, the condition of this obligation is such that if the above-named Colburn Barrell and Aurelia J. Barrell shall prosecute said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) COLBURN BARRELL. [SEAL.]
AURELIA J. BARRELL. [L. S.]
W. H. HARRIS. [L. S.]
LEVI ANDERSON. [L. S.]

Signed, sealed, and delivered in presence of—
J. G. CHAPMAN.
W. W. CHAPMAN.

UNITED STATES OF AMERICA, *District of Oregon*, } *ss*:

I, W. H. Harris, of the city of Portland, Oregon, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth, in property situated therein, the sum of thirteen hundred and fifty dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

(S'g'd) W. H. HARRIS.

Subscribed and sworn to before me this 16th day of July, 1883. Witness my hand and notarial seal affixed.

[NOTARY'S SEAL.] (S'g'd) J. G. CHAPMAN,
Notary Public for Oregon.

145½ UNITED STATES OF AMERICA, *District of Oregon*, } *ss*:

I, Levi Anderson, of the city of Portland, Oregon, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and

that I am worth, in property situated therein, the sum of thirteen hundred and fifty dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

(S'g'd) LEVI ANDERSON.

Subscribed and sworn to before me this 16th day of July, 1883. Witness my hand and notarial seal affixed.

[NOTARY'S SEAL.] (S'g'd) J. G. CHAPMAN,
Notary Public for Oregon.

[Endorsed:] No. —. U. S. circuit court, district of Oregon. Charles E. Tilton *vs.* Colburn Barrell & Aurelia J. Barrell. Approved. Matthew P. Deady, U. S. district judge. Copy of bond. Filed July 16, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

146 And afterwards, to wit, on the 22 day of July, 1883, there was duly filed in said court a citation in words and figures as follows, to wit:

147 UNITED STATES OF AMERICA, } *ss:*
District of Oregon, }

To C. E. Tilton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, A. D. eighteen hundred and eighty-three, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein Colburn Barrell and Aurelia J. Barrell [are] plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this July 16th, 1883.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

[Endorsed:] No. 865. U. S. circuit court, district of Oregon. C. E. Tilton *ads.* Colburn Barrell & Aurelia J. Barrell. Citation on writ of error.

148 STATE OF OREGON, } *ss:*
Multnomah County, }

I, W. W. Chapman, being duly sworn, upon oath do say that on the 21st day of July, A. D. 1883, at Portland, in said county, I exhibited the annexed citation to Henry Ach, one of the attorn*ies* of record for the plaintiff, C. E. Tilton, against Colburn Barrell and Aurelia J. Barrell, in the action and judgment referred to in said citation; that the said Ach read the same, and thereupon I delivered to him a true copy thereof, to which he replied "all right."

W. W. CHAPMAN.

Subscribed and sworn to before me, the undersigned, notary public of the State of Oregon in the county of Multnomah, this 23rd day of July, A. D. 1883.

In testimony whereof I have hereunto subscribed my name and affixed my seal notarial the day and year aforesaid.

[Seal J. G. Chapman, Notary Public, Oregon.]

J. G. CHAPMAN,
Notary Public for Oregon.

149 [Endorsed:] Supreme Court of the United States. Colburn Barrell & Aurelia J. Barrell *vs.* C. E. Tilton. Citation on writ of error and affidavit of service. Filed July 22, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

150 THE UNITED STATES OF AMERICA, } *ss:*
District of Oregon, }

I, R. H. Lamson, clerk of the United States circuit court for the district of Oregon, do hereby certify that the foregoing copy of the record and proceedings in the above-entitled cause of C. E. Tilton *vs.* Colburn Barrell *et al.* has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this November 25, 1883.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON, *Clerk.*

Endorsed on cover; Oregon C. C. U. S. No. 324. Colburn Barrell and Aurelia J. Barrell, plaintiffs in error, *vs.* C. E. Tilton. Filed 3rd October, 1883.

119-637

IN THE

SUPREME COURT

OF THE

UNITED STATES

FOR THE

DISTRICT OF OREGON.

COLBURN, BARRELL and AURELIA J. BARRRLL, his wife, *Plaintiffs in Error.*
vs.
C. E. TILTON, *Defendant in Error.*

No. 79.

In Error to the Circuit Court of the United States for the District of Oregon.

W. W. CHAPMAN,
Attorney for Plaintiff in Error.

PORTLAND, OREGON:
SWOPE & TAYLOR, LEADING PRINTERS, 5 AND 7 WASHINGTON STREET.
1886.

IN THE

SUPREME COURT

OF THE

UNITED STATES

FOR THE

DISTRICT OF OREGON.

COLBURN, BARRELL and AURELIA J. BARRRLL, his wife, *Plaintiffs in Error.*
vs.
C. E. TILTON, *Defendant in Error.*
No. 79.

In Error to the Circuit Court of the United States for the District of Oregon.

STATEMENT OF THE CASE.

On the second day of November, 1882, C. E. Tilton of New York, brought an action in the Circuit Court of the United States for the District of Oregon, against Colburn Barrell and Aurelia J. Barrell, his wife, to recover the pos-

session of a certain tract of land, embracing two tracts, one of the husband and one of the wife, situated in Multnomah county, State of Oregon, containing thirteen acres more or less.

The complaint is in the usual form, alleging the parties to be husband and wife in the unlawful and actual possession, and wrongfully withholds the possession thereof. (Record page 1.)

To the complaint the defendant A. J. Barrell, demurred, and assigned for cause.

First, That she is sued as the wife of Colburn Barrell.

Second, That the complaint does not state facts sufficient to constitute a cause of action; that being sued as wife there are no allegations in the complaint of any act for which she as wife is responsible. (Record, page 4.)

On the 27th of December, 1882, the demurrer was overruled See opinion page 7, printed Record.

On the 28th of December, 1882, Colburn Barrell filed his answer alleging that as to a certain ten acres of the tract he was a tenant of A. J. Barrell, giving residence and declining to defend for the same. (R., p. 5.)

Immediately thereafter, on the same day, Aurelia J. Barrell moved the court to be sub-

stituted in the *place* of Colburn Barrell, which motion the court overruled.

On the 15th day of January, 1883, A. J. Barrell filed her separate answer denying the allegations of the complaint as to eleven acres of the tract, and as to such tract setting up a separate defense of new matter, claiming that as to said tract she is the owner in fee simple and entitled to hold the same.

And for a further separate answer alleges that the plaintiff claims title to the said premises through a conveyance executed by this defendant to W. S. Ladd of date, January 18th, 1877; that the deed, though absolute upon its face, was understood and intended by said Ladd and this defendant to be only a mortgage by this defendant of her separate property as security for Colburn Barrell to the said Ladd to secure the payment to said Ladd of the sum of $3850 and interest payable in two years; that at the time of the execution of said deed it was agreed that said Ladd should execute to this defendant a defeasance by which, if the said Colburn Barrell or this defendant, should pay the said sum of money as aforesaid, the said deed should be null and void, which the said Ladd neglected and failed to do, but on the contrary treated the said deed as absolute and contracted and sold

the same to Colburn Barrell by an instrument in writing under his name and seal. (R. p. 14).

For Replication the plaintiff denies the general allegations of the answer, and as to the last separate defense admits that said deed of the 18th of January was intended as a mortgage "of A. J. Barrell's separate property but denies that it was payable in two years; that the same was expressly made payable on or before March 7, 1878, *by a writing* executed by said Ladd to Colburn Barrell on March 22, 1877, whereby the said Ladd did promise and agree and covenant to and with Colburn Barrell that if Colburn Barrell should, on or before the 7th day of March, 1878, pay the said sum of money, that then the said Ladd would execute and deliver to him a deed for the lands described in said original deed, including the separate property of this defendant; that the said writing was made pursuant to an understanding at the time of the execution of said deed; that the said writing was accepted by Colburn Barrell for himself and the said A. J. Barrell, he *acting for and being her duly authorized agent and so accepted as a defeasance* of said mortgage.

ESTOPPEL.

For a further replication the plaintiff in said suit pleads and alleges that the said A. J. Barrell ought not to be permitted to allege the facts stated in last separate defense for the reason and because on the 4th day of December, 1879, said Ladd commenced a suit against Colburn and A. J. Barrell as husband and wife; that defendants were duly served with process; that both defendants duly appeared and answered; that such proceedings were thereafter duly had, that said court, then having jurisdiction of *the parties and the subject matter* to and of said suit *that on the 22nd day of March, 1880*, a final decree was duly made and entered in said court *upon the merits* of said suit, decreeing and declaring the said instrument to be a mortgage; that in said decree it was by said court found that the condition of said mortgage had been broken by said defendants, and that said mortgage be foreclosed and the property sold.

See full Replication, pages 17, 18, 19 of printed record, and amendments page 25).

To the replication no further pleadings is required. "But the allegation of new matter in a reply is to be deemed controverted by the

adverse party as upon a direct denial or avoidance as the case may require."

Code, page 124, section 92.

TRIAL.

Upon the trial plaintiff offered in evidence the original deed from Colburn Barrell and wife to W. S. Ladd of date January 18, 1879, for the premises described in the complaint This defendants objected to because it is admitted in the pleadings to have been intended as a mortgage, the objection was overruled and the deed read to the jury. Defendants excepted.

The plaintiff then in support of his plea of estoppel offered in evidence a certified transcript of the record and proceedings of a suit in the Circuit Court of the State of Oregon for Multnomah county, wherein W. S. Ladd was plaintiff and Colburn Barrell and A. J. Barrell, his wife, were defendants, embracing summons, complaint, answer; motion for judgment and decree; order of court taking under advisement motion for modification of decree, order of sale, affidavits, order referring the cause to W. B. Gilbert on March 6, 1880; referees report filed March 18, 1880; order confirming referees report March 19, 1880; bill of disbursements

filed March 19, 1880; final decree of date March 19, 1880, and order that process issue therein; and a second decree of March 22, 1880.

See Exceptions and Record, pages 43, 44 and 45.

To the introduction of this evidence defendants objected, for the following reasons, to-wit:

First; The transcript is not properly endorsed;

Second, The defendant, A J. Barrell, was sued as wife and that the answer is not her answer, that the decree of March 22, 1880, if valid, does not bar her rights as mortgagor of her separate property as security for the debts of Colburn Barrell.

Third, Because she claims that the record shows that a final decree in said suit was made and entered on the 19th day of March, 1880, and signed by the judge, and remained on record unmodified, vacated or reversed, and claimed that all the proceedings prior thereto terminated in said decree, and the court had no jurisdiction to enter the second decree, though done in the same term of court and the same is void and of no effect. The objections were overruled and defendants excepted. (See printed Record, page 44)

The plaintiff then offered in evidence a certified copy of the order of sale with copy of decree of the 22nd of March, 1880, thereto prefixed, dated 23rd March, 1880, directing a sale under said decree with the usual proceedings thereunder, to the introduction of which defendants objected for the following reasons:

First, Each and all of said proceedings set forth in said records were had done and performed under and by authority of said decree of the 22nd of March, 1880, and are void and of no effect, and conferred no title, and the title of A. J. Barrell of her separate property did not pass by said deed. The objections were overruled and defendants excepted. (See Record, page 44.)

The plaintiff then offered in evidence a deed by W. S. Ladd and wife to the plaintiff of date September, 1882, to the introduction of which defendants objected, because, that under the decree of the 22nd of March, 1880, it passed no title, which objection the court overruled and defendants excepted.

The plaintiff having given nor offered any other, evidence rested.

The defendants then moved the court for a *non suit* for the following reasons:

First The plea of estoppel alleges that the proceedings took place with reference to the decree of the 22nd of March, 1880, and that on that day the final decree was entered.

Second, It does not allege or call to its aid any other decree.

Third, The plea of estoppel of the decree of the 22nd of March, 1880, was not amendatory of the final decree of the 19th of March, 1880.

Fourth, That under the ruling of the court that the decree of the 22nd is amendatory of the decree of the 19th the estoppel is not supported by the evidence. The motion was overruled and defendants each excepted.

The defendants then offered in evidence a copy of the judgment lien docket of said state circuit court showing that said decree of the 19th of March, 1880, in pursuance of the statute was on the 19th day of March. 1880, duly docketed:

Code C. P. p. 160, section 263, provides:

"Immediately after the entry of judgment in any action the clerk shall docket the same in the judgment docket." * * * "From the date of docketing the judgment * * * such judgment shall be a lien."

Page 194, sec. 403: "The provisions of chapter three of this code shall apply to the enforcement of decree."

The defendants then rested their case, and no further evidence was given or offered on either side.

The court then instructed the jury that the sheriff's deed conveyed the estate to W. S. Ladd and Ladd's conveyance vested the estate in the plantiff, and their verdict must be for the plaintiff that he is the owner of the premises and entitled to the possession thereof, as against the defendants, to which instructions the defendants each excepted.

Whereupon the jury returned the following verdict:

We, the jury in the above entitled cause, do find for the plaintiff and that he is the owner in fee simple of the property in the complaint described and that he is entitled to the possession thereof.

The defendants each filed a motion for a new trial. (See printed Record, pp. 33 and 34.

As the questions involved in the motion for a new trial will come up elsewhere, it is unnecessary to specify them here.

The motion was heard before Mr. Justice

Field and Judge Deady, and overruled and subsequently an opinion announced by Judge Deady. (See Record, page 37.)

The same was overruled. (See Opinion, page 36.)

ASSIGNMENT OF ERRORS.

I.

The court erred in overruling the demurrer of defendant, A. J. Barrell, to the plaintiff's complaint.

II.

In overruling the motion of A. J. Barrell to be substituted as defendant in the *place* of Colburn Barrell, her tenant.

III.

In admitting in evidence the absolute deed of Colburn Barrell and A. J. Barrell, his wife, to W. S. Ladd for the premises in controversy of date January 18, 1887, it being admitted by plaintiff to be a mortgage.

IV.

In overruling defendants objection and permitting to be read to the jury each and all of the several documents embraced in the transcript of the record and proceedings of the state court Exhibit No. 1 attached to the bill of Exceptions.

V.

In overruling defendants objection and permitting to be read in evidence to the jury the clerk's order of sale and copy of decree of the 22nd of March, 1880; thereto prefixed; the sheriff's return; certificate of sale; order of confirmation; copy of sheriff's deed to Ladd.

VI.

In overruling defendants objection to the reading in evidence the deed of W. S. Ladd and wife to the plaintiff.

VII.

The court erred in overruling the motions of defendant, A. J. Barrell for non suit.

IX.

In instructing the jury that the sheriff's deed conveyed the estate of the defendants in the premises in controversy to W. S. Ladd, and the conveyance from Ladd to the plaintiff vested the estate in the plaintiff, and therefore the verdict must be for the plaintiff that he is the owner of the premises, and entitled to the possession thereof as against the defendants.

X.

The court erred in overruling defendants motion for a new trial and entering a joint judgment on the verdict.

SUBSTANTIAL RIGHTS ARE INVOLVED.

It is submitted that the errors complained of are not merely in matters of form, nor such as may be disregarded on a ground that they do not affect substantial rights.

1. The right to redeem is regarded as of great value, and it can not be barred except by a legal sale.

2. The decree or "judgment roll" of the ate court was not offered in the court below r correction; it was presented as record evidence of a proceeding already completed in another court.

3. It appears on the face of that record (Exhibit 1, transcript, p. 50), and it is admitted by the ~~complaint and~~ replication in this case, that he debt sought to be secured is a debt of the husband, and that a specific parcel of the land was the wife's sepa ate property; a property that the State constitution, Art. XV, Sec. 5, renders incapable of being subjected to the payment of the husband s debt, either by the wife or by any other power. The constitutional provision is as follows:

"SEC. 5. The property and pecuniary rights of every married woman at the time of marriage, or afterwards acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband; and laws shall be passed providing for the registration of the wife's separate property."

Oregon Code, p. 122.
Bibb vs. Pope 43 Ala. 190, 199.
Colemon vs. Smith, 55 Ala. 368.
Conrad vs. Le Blank, 29 La. Ann. 123.
Foxworth vs. Magee, 44 Miss. 430.

4. The same record shows that it appeared affirmatively in the State court that the pleadings did not present facts constituting a cause of action or suit against the wife, Aurelia Barrell, and for that reason both the decrees rendered in the State court are void as against her.

5. The jurisdiction that the State court once acquired to hear and determine a cause against the husband, Coleburn Barrell, terminated with the final decree of date March 19, 1880, and it could not be revived or renewed except by an opening of that decree.

It is claimed that the right to redeem still exists.

Baines vs. Burbridge, 15 La. An. 628.
Theriet vs. Voorhies, 12 La. An. 852.

ARGUMENT.

The principal points in the argument are:

First. Overruling the demurrer to the complaint.

Second, Denying the application of A. J. Barrell to be substituted in the place of Colburn Barrell who pleaded tenancy.

Third, The admissibility of evidence of possession.

Fourth, The overruling of the motion for non suit.

Fifth, The admission and effect of the evidence to support the plaintiff's replication of estoppel.

Inasmuch as if the Replication of estoppel is a failure, the judgment below must be reversed whatever might be the conclusion upon the other points we shall consider that question first.

The defendant, A. J. Barrell, in her last separate defense (Record, bottom of page 14) among other things alleges that the plaintiff claims title under a deed by this defendant and Colburn Barrell, of date the 18th of January, 1877, to W. S. Ladd, and that the said deed, though absolute on its face, was a mortgage by this defendant of a portion of the premises her

separate property, as security for the debt of Colburn Barrell.

To this defense the plaintiff replies, admitting the deed to be a mortgage as alleged, but alleging and setting forth with particularity and precision, a suit, proceedings and final decree of foreclosure on said mortgage of the 22nd day of March, 1880. (See Record, p. 26.)

The plea of estoppel relies solely upon the decree of the 22nd, that all the proceedings were had and terminated in the decree of the 22nd as the final and only decree in the suit. The plea itself under oath *ignores and repudiates* the idea of the existence of any other decree, or that the decree of the 22nd was intended as a *modification, vacation* or *amendment*, of any other decree—but on the contrary, alleges that on the 22nd day of March, 1880, the court had jurisdiction of the parties, and of the *subject matter* to and of said suit, and then and there made and entered in said court a *final decree upon the merits of said suit* setting ou in detail the said decree of the 22nd of March, 1880, and that all the subsequent proceedings were had and done under and by virtue of the alleged decree of the 22nd of March.

But on presenting the transcript of the record it shows that the summons, complaint, ans-

wer, motion for judgment on the pleadings, order taking the motion under advisement, motion for modification of decree, affidavits, order referring the motion to Gilbert as referee, referees report, order confirming the report, bill of disbursements *were prior to and terminated in a final decree on the 19th day of March, 1880,* and that such final decree signed by the presiding judge remains of record unreversed, modified or vacated.

While it is admitted that during the term the *records* remain in the breast of the court for correction, amendment, modification or vacation, we claim that the court has no jurisdiction of the parties or of the subject matter (to hear, try and determine the case anew) and enter another independent decree, and that such a decree is without jurisdiction, and null and void and of no effect.

Courts of record have two separate jurisdictions:

First, To *hear* and *determine* the action or suit and enter final judgment or decree.

Second, To correct, amend, modify or vacate its judgment or decree during the term at which they are entered.

First, Jurisdiction to *hear* and *determine* the suit was obtained by the filing of the com-

plaint and the service of the summons. An answer was filed and the plaintiff moved the court for judgment on the pleading. This motion was taken under advisement. The case was sent to a referee to report the form of a decree for the plaintiff. The referee made a report giving the form of the decree. On the motion of the plaintiff the report was confirmed and subsequently, to-wit: on the 19th day of March, 1880, the court having jurisdiction of the parties and of the subject matters to and of said suit, and having heard and determined the matters in controversy then and there made a final decree upon the merits of said suit foreclosing the mortgage and directing the property to be sold as in the decree provided, and barring all equity of redemption and for costs and disbursements amounting to the sum of $——.

Thus the court *heard* and *determined* the suit and entered a final decree and on the same day in pursuance of the statute the same was duly entered upon the judgment docket.

This decree concluded the subject on which it was rendered and the law of the case. In the language of Chief Justice Marshall, so often quoted and affirmed, "*it put an end to all inquiry into the fact by deciding it.*"

The learned judge who tried this case, himself recognizing the termination of the proceedings in the decree, in the case in Re. Boyd, 4 Sawyer 265, says: "*The judicial proceeding which commences with the filing of the complaint ends with the judgment therein.*"

The decree of the 19th of March, 1880, is a final decree, and all the judicial proceedings had in said suit prior thereto, terminated therein. They became irrevocably fixed to and anchored in that decree so long as it remains unreversed or vacated. These judicial proceedings, the life and support of the final decree, can not be taken from it and made to apply to and terminate in a second decree in the same suit without first vacating the final decree.

Secondly, But while the court in that suit had exercised and expended its jurisdiction of the *parties* and of the *subject matter* of this suit which commenced with the filing of the complaint and service of the summons and terminated in a final decree, such as that of the 19th, it nevertheless had a general jurisdiction over this and all its records during the term—not confined to any particular case, to make them *speak the truth* to the extent of correction, amendment, modification or vacating a final judgment or decree.

In the correction, amendment or modification of a final decree it still stands as the final decree of the date when entered subject to the modification or corrected. The order for correction or amendment referring directly to it, specifying with particularity in what respect it is corrected or amended. It is the decree from which an appeal lies. It is the final decree.

But in the exercise of this general jurisdiction if it is deemed necessary and advisable to enter a new independent decree or judgment, it can only be done by obtaining or resuming the original jurisdiction of the *parties* and the subject matter of the suit. This is done by vacating the final judgment or decree, when the judicial proceedings which commenced with the filing of the complaint and service of the summons may terminate in a new judgment or decree either granting relief or dismissing the suit. Thus becoming the final judgment or decree.

2 Peters, 326, 3 Peters 431 ; 13 Peters 156; 2 Howard 280; 6 How. 201, 260; 14 How. 297; 2 How. 43; 3 Wall 320 ; 7 Wall. 342 ; 9 Wall. 38; 18 Wall. 163, 7; 18 How. 174; 19 Cal. 127. 706 ; 43 Maryland 219 ; 16 Florida, 708 ; 24 Wis. 477; 25 Wis. 517 ; 30 Wis. 521 ; 2 Dainels Ch'y Pr., 1199; 7 Paige 18.

In Re. Boyd 4 Sawyer 265 Deady J. says:

"The judicial proceeding which begins with the filing of the complaint ends with the entry of judgment therein, 16 Nebraska 55."

In *U. S.* vs. *Harmison*, Sawyer 556, Deady J. says:

"A court has the power to set aside or modify its judgments in both civil and criminal cases during the term at which they were given. The journal entry shows that to bring their case within the ruling of the Supreme Court of the United States in 18th Wallace, 163, suspended the execution of the sentence till further order. This order not having been entered by the clerk it was first entered *nunc pro tunc*, then the sentence vacated, and then a different sentence pronounced."

44 Texas 16; 45 Cal., 653.
106 U. S. 429, 552; 4 Ind., 451

Now let us see how the learned judge gets round this question. He says:

"It would have been more orderly and convenient in making the second decree to have referred to the first one and stated in what particular the latter was intended to modify, supplement or supersede the former. But such a statement was not absolutely necessary, on the

contrary, it is to be presumed that a second decree made within the term is intended to modify a former one just so far as it differs from it either in length or breadth." (Opinion, first paragraph, page 39, Record.)

Such a proposition is unsupported by the ruling of any higher court for the last five hundred years, and if established by the rulings of this court in one case, however unimportant, must result in the most serious consequences. If there can be two final decrees in the same suit equally valid and final, each liable to appeal, each constituting a lien, each carrying costs, each entitled to execution for the same reason, there may be twenty. Certainly there is no law authorizing the presumption and there is not one word or sentence in the decree upon which such a presumption can be founded, moreover, and overshadowing everything, the sworn replication of estoppel, in the most clear and emphatic terms, declares that the decree was not amendatory of any other decree, but a complete final decree, based on the proceedings from the complaint to the decree of the 22nd of March.

But Judge Deady in his opinion upon the question, goes still further, he says :

" But in legal effect there is no difference n these two decrees of March 19th and 22nd,

and the execution may have been well issued on either of them."

That is just what we say. In form they are two complete final decrees in the same suit, so independent of each other that each orders process of execution.

Overlooking the inconsistency of this ruling with the former that the decree of the 22nd is presumed to be intended to modify that of the 19th. We are at a loss for the common sense that would enable us to determine why, if execution might issue upon either, it might not issue upon both.

The court undertakes to say that the two de-decrees *evidently* come in a particular way when we find such evidence. Attorneys usually draw up the decree and it is hardly to be supposed that an attorney drawing up the first decree and having it entered would draw up a second independent decree without some motion to the court to vacate the first. It is more reasonable to suppose that, as there were too attorneys in the case, that one drew up the first and had it entered, while the other, not knowing the fact, drew up the second.

But how it came is not the question, there are in form two independent final decrees of record, having no reference to each other, and the question is, which is the valid final decree? We

say that of the 19th of March, is the valid final decree, and that of the 22nd of March is a nullity, and the sale under it is void and of no effect.

ARGUMENT UPON OTHER POINTS.

I. The court erred in overruling the demurrer of A. J. Barrell to the complaint.

It is alleged in the complaint that the defendants are husband and wife, with no allegations to charge her separately, and the legal presumption is that she is there, if at all, as wife, as one of the family, and a judgment and suit for the possession against the husband would remove the wife and family from the premises. Having alleged that A. J. Barrell is the wife of Colburn Barrell, it was necessary to allege and prove some separate act of hers for which she is responsible. This is not done.

II. It was clearly an error to overrule the motion of A. J. Barrell to be substituted in the place of Colburn Barrell, who had pleaded tenancy, named his landlord, and her place of residence and declined to defend for that part of the tract.

Section 313 of the Code C. P., provides that;

"Such action shall be commenced against the person in *actual* possession of the property

at the time." And section 314 provides; "that a defendant who is in *actual possession* may for answer plead that he is in actual possession *only* as tenant of another, naming him, and his place of residence, and thereupon the landlord if he applies therefor *shall* be made defendant *in place* of the tenant."

The plea of tenancy is an admission by the tenant that he is in actual possession, and that the landlord is not in the actual possession, and if unreplied to becomes a record of that fact. If the landlord applies and is admitted in his place he then occupies the position of admitting actual possession and withholding, whether rightfully or wrongfully to be determined by the evidence.

But the refusal to permit the landlord to be substituted in the place of the tenant was not only in violation of the express provisions of the statute, but an admission by the plaintiff that the person named as landlord, though made *a* co-defendant was not in *actual possession*, and did not, and could not withhold it. It, in effect, constituted a releance by the plaintiff upon his remedy against the tenant, and entitled the co-defendant to a verdict. If, consistently, (which we deny) that the action could still be proceeded with against the landlord, the burden of

2 Johns 441
4 " 493
24 Howells 268
Tyler on Eject 472
43 Cal 261
44 " 45
45 " 165-7

proof of actual possession and unlawfully withholding by such landlord, co-defendant, would be upon the plaintiff and this he has utterly failed to offer or give. It was therefore a fatal error in refusing A. J. Barrell to be substituted, and a fatal error in a joint verdict and joint judgment.

III. It was error to admit in evidence the absolute deed of Colburn Barrell and A. J. Barrell, his wife, to W. S. Ladd, of January 18, 1877.

This deed is alleged and admitted in the proceedings to be a mortgage, and as such it did not entitle the plaintiff to recover possession.

"A mortgage of real property shall not be deemed a conveyance so as to enable the owner of this mortgage to recover."

Code, p. 177, section 323.

IV.

It was an error to admit in evidence——————the several documents embraced in Transcript Exhibit No. 1 attached to and made a part of the bill of exceptions.

The transcript embraces copies of the proceedings in the alleged foreclosure suit wherein W. S. Ladd was plaintiff and Colburn Barrell and A. J. Barrell, his wife, were defendants.

The purport and date of each of said copies appear in the bill of exceptions and at large in printed record, pages 45 to 62.

Two important questions arise in considering the admissibility of this evidence.

First, That the decree of the 22nd of March, 1880, if valid, does not bar the rights of A. J. Barrell as mortgagor of her separate property as security for the the debts of Colburn Barrell.

The decree was upon the pleadings and as prayed for in the complaint. The complaint set forth the absolute deed, and a *title bond* to Colburn Barrell for the entire tract including A. J. Barrell's separate property. This bond was in that suit treated as constituting the defeasance, and as such foreclosed. *It did not recognize A. J. Barrell as having any rights*, moreover, it bound Ladd not in any manner to encumber the land until the day of payment. If payment should be made, Ladd was to convey the whole property back to Colburn Barrell which included the separate property of A. J. Barrell.

For the purpose of validating this bond as a defeasance to the absolute deed as against A. J. Barrell's separate property, the plaintiff in his replication herein alleges that it was according

to the understanding of the parties, and accepted by Colburn Barrel for himself and as agent of A. J. Barrell, he being her duly authorized agent. These allegations in the reply the statute denies. Then where is the evidence? there is none to support these allegations. There was no evidence given or offered, either as to the alleged understanding or as to Colburn Barrell being her duly authorized agent, or pretending to be such.

Then the Replication having admitted the allegation in her answer that the deed was intended as a mortgage of her separate property as security for the debt of Colburn Barrell and that Ladd was to have executed to her a defeasance, but in avoidance alleging that the said title bond to Colburn Barrell was accepted by Colburn Barrell, the authorized agent, as a defeasance which plaintiff utterly fails to prove or offers to prove, establishing beyond question that the ———— title bond to C. Barrell was in express violation of the original terms of the mortgage, and that the foreclosure of the mortgage constituted by the deed and title bond as alleged in the complaint in the foreclosure suit and alleged in plaintiff's replication herein, did not bar her rights as mortgagor of her separate property as security for C. Barrell.

Inasmuch as the plaintiff in the suit to foreclose turned his deed, absolute on its face, into a mortgage with the title bond to Colburn Barrell as the defeasance, knowing, as he admits that the deed included her separate property as security, in order to bind her separate property he should have set out just what he has done in this reply—that is, that Colburn Barrell, acting and being her duly authorized agent, accepted the bond as the defeasance, His reply is now a confession of what he should have then done.

The decree of foreclosure was a judgment upon the pleadings evidently upon the complaint, treating the answer as amounting to nothing. Although the signature of A. J. Barrell appears to it, upon its face it was the answer of Colburn Barrell alone, drawn by himself and in the singular as his individual statement. So that according to the pleadings herein, and the record of proceedings in foreclosure, the rights of A. J. Barrell as mortgagor of her separate property as security for Colburn Barrell were not involved or disposed of in that suit, and she is still such mortgagor.

Under all the circumstances the court erred n the admission of the evidence, and in instructiing the jury to find a joint verdict, or any verdict, or any against either of the defendants,

and especially against A. J. Barrell, and in overruling the motion for a new trial and entering judgment.

W. W. CHAPMAN,
Attorney for Plaintiff in Error.

W. W. Upton,
of Counsel.

119-637

Supreme Court of the United States.

OCTOBER TERM 1886.

No. 79.

COLBURN BARRELL and AURELIA J. BARRELL,
Plaintiffs in Error,

vs.

C. E. TILTON.

BRIEF FOR C. E. TILTON, DEFENDANT IN ERROR.

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Attorneys for Defendant.

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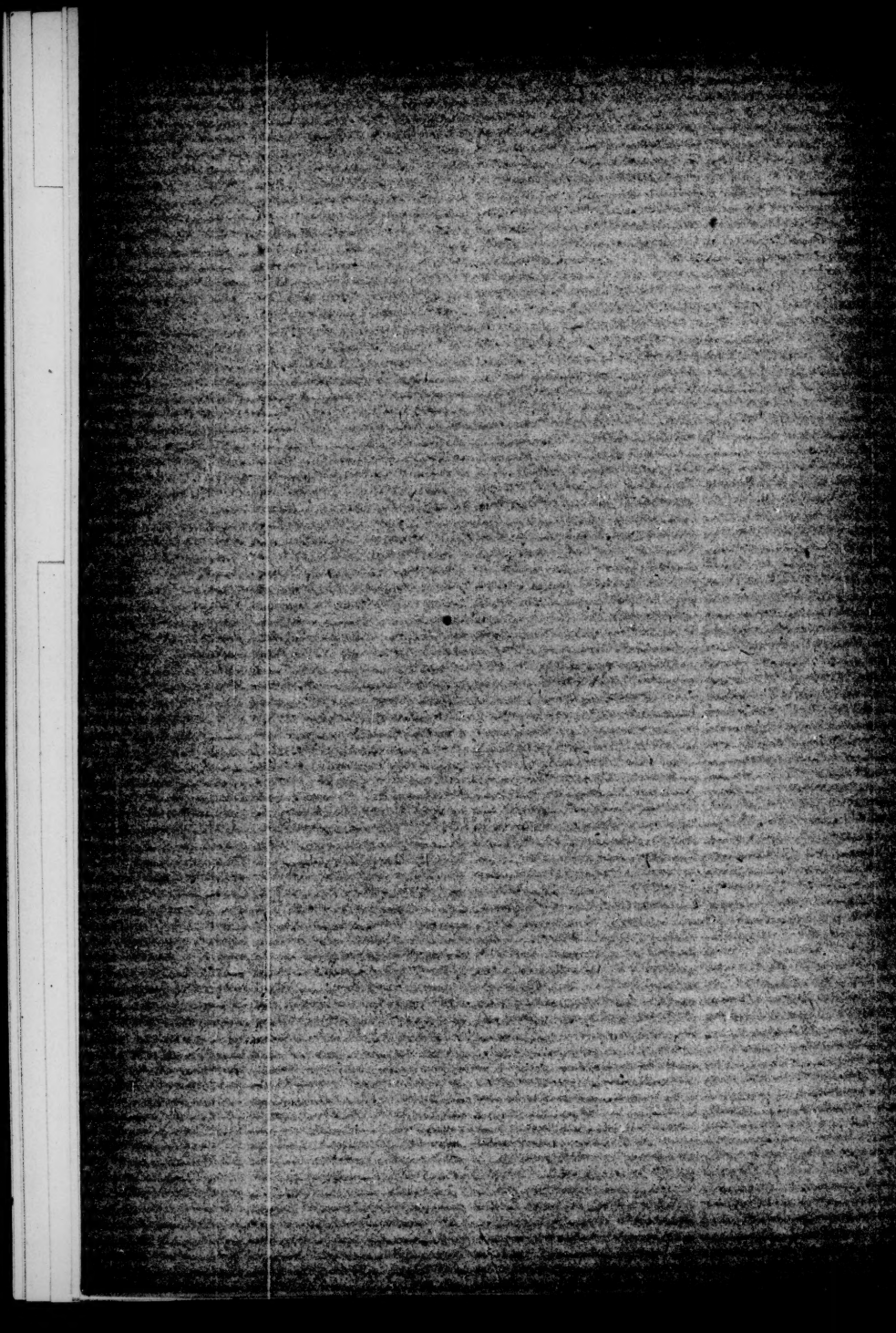

Supreme Court of the United States.

October Term 1886.

COLBURN BARRELL and AURELIA J. BARRELL, Plaintiffs in Error,
vs.
C. E. TILTON.

No. 79.

In Error to the Circuit Court of the United States for the District of Oregon.

Brief for C. E. Tilton, Defendant in Error, by Shellabarger & Wilson, his Attorneys.

The action below was in the nature of ejectment, the complaint being, by defendant in error, C. E. Tilton, filed, in the Circuit Court of the United States for the District of Oregon, on November 29, 1882, against Colburn Barrell and his wife, Aurelia J. Barrell, defendants.

The substance of the petition is that Tilton was a citizen and resident of New York, and the defendants citizens of Oregon; that plaintiff is owner, in fee, of the real estate described in the petition, containing 13¼ acres, and alleging that defendants are in possession, and wrongfully withhold such possession from plaintiff, and asks a judgment for recovery of possession and for costs and disbursements. (R., 1.)

On December 18, 1882, the said Aurelia J. demurred to the petition, and on the 27th of December, 1882, the

demurrer was overruled, and the defendant, Colburn, was given until the 30th of December to file answer, and said Aurelia J. was given until 2d of January, 1883. (R., 4.)

On December 28, 1882, said defendant, Colburn, filed his answer, defending for only two and three-eighths acres of said premises, the substance of the answer being—

That plaintiff derives his title through a conveyance from William S. Ladd and wife, of September 28, 1882; that Ladd was always a citizen and resident of Oregon; that said conveyance was collusively made, in order to give said Circuit Court jurisdiction; was made without consideration, and to enable Ladd to maintain an action in the name of plaintiff, &c.; denies that plaintiff is owner of the two and three-eighths acres claimed by said Colburn. The answer further proceeds to aver that—

As to the residue of the said tract, to wit, 11 acres, lying south of said two and three-eighths acres, the said Colburn alleges he is only tenant of his wife Aurelia J.; alleges that he is the owner in fee, and entitled to possession of said two and three-eighths acres.

Said answer further alleges, as a last and special defense, that plaintiff, Tilton, derives his title to said two and three-eighths acres by means of a certain deed executed by said defendants to William S. Ladd, dated January 18, 1877; that said instrument purports to be a deed in fee for the entire premises claimed in the petition, but that said instrument was really a mortgage to secure the said William S. Ladd $3,850, with interest from its date—that said moneys became due in two years from such date, and avers his willingness to pay said money. (R., 5, 6.)

On January 15, 1883, the plaintiff, Tilton, filed a reply to the answer of Colburn Barrell. (R. 9, 11.) The substance of this reply is a denial of the averments of the answer as to the collusive and fraudulent character of the conveyance, by William S. Ladd and wife, to plaintiff;

it replies to the third separate defense of said Colburn, and denies that said Colburn is tenant of his wife, as averred; denies that said Colburn is the owner, or entitled to possession, of said two and three-eighths acres, or any part of said premises; replies to the last separate defense of said Colburn as to the deed of January 18, 1877, being a mortgage, and says that defendants should not be permitted to make the defense set up in such last separate defense, for that, on December 4, 1879, and more than two years after the date of said deed of January 18, 1877, alleged to be a mortgage, the said William S. Ladd instituted in the Circuit Court of Multnomah county, Oregon, a suit against said Colburn and Aurelia, for the purpose of having said deed declared a mortgage, and for a decree foreclosing the same; that said Colburn and Aurelia were duly served with process, and appeared and made answer; and that on the *9th* of February, 1880, a final decree was rendered, upon the merits, declaring said instrument of January 18, 1877, to be a mortgage; and that the conditions thereof had been broken; and that a decree of foreclosure was rendered, and an order was made ordering said premises, named in the petition, to be sold as in the decree directed; and that the said Colburn and Aurelia, and all claiming under them, should be barred and foreclosed of all interest in said property; that such further proceedings were had in the court that an order for the sale of the said property was, on March 23, 1880, issued to the sheriff of said county, directing him to sell said premises as in the decree and order prescribed; that the property was, by the sheriff, advertised, and on the 25th of March, 1880, the sheriff duly levied upon the property under said order, and on the 24th of April, 1880, the same was, under such order, sold to William S. Ladd; that said Colburn Barrell was present at the sale and assisted therein; that on the 15th of June, 1880, the sale was, by the court, confirmed; that on the 25th of August, 1880, the sheriff executed a deed

for said property so sold to said William S. Ladd; that no part of the property had been redeemed, and the decree remains unappealed and unreversed; that the said defense set up by said Barrells as the last defense of said answer (R., 6) was set up by them in said foreclosure suit in the County Circuit Court.

On the 6th day of January, 1883, the said Aurelia J. filed her separate answer, which is substantially the same as the answer of her husband. (R., 14, 15.)

On the 7th of February, 1883, the court refused to strike out portions of this last-named answer, and gave leave to the plaintiff to file a reply by the 12th of February, 1883.

On the 9th of February, 1883, the plaintiff filed a reply to the answer of said Aurelia J., the reply being substantially the same as that filed the 15th of January, 1883, in reply to the answer of the husband. (R., 17 to 19.)

On the 9th of February, 1883, plaintiff, Tilton, filed a motion for leave to amend his reply to the answer of Colburn Barrell, by changing the date of the final decree from the *9th of February*, to the *22d of March*, 1880, and such amended reply was filed on the 9th of February, 1883, (R., 19, 20.) and on the 12th of February such motion was allowed. (R., 21.)

On the 8th of March, 1883, an amended reply was, by leave of court, filed by the plaintiff to the separate answer of said Aurelia J. The denials in this reply are substantially the same as contained in the above-named reply to the husband's answer.

The reply to the last and the separate defense in said Aurelia's answer admits that the said conveyance from said Colburn and Aurelia, of the 18th of January, 1877, was intended as a mortgage; denies that it was payable two years from date, but alleges that it was expressly made payable 7th of March, 1878, by a writing executed by W. S. Ladd to said Colburn on the 22d of March, 1877, in which Ladd promised that, if Colburn would, before the 7th of March,

1878, pay said Ladd $3,883.17 in coin, and all taxes on the land, with interest at one per cent. a month, then Ladd would make to said Colburn a quit-claim; and that time was made to be of the essence of the agreement, &c.

The reply then sets up said decree of foreclosure, and proceedings thereon, substantially as set forth in the reply to the husband's answer, this reply alleging the final decree of foreclosure as made 22d of March, 1880, and alleging that the order of sale was issued 23d of March, 1880; that the levy by the sheriff was made, under the order of sale, 25th of March, 1880, and that the premises were sold, by the sheriff, on the 24th of April, 1880; that the sale was confirmed June 15, 1880; that on the 25th of August, 1880, the sheriff executed a deed, for the premises in suit, to said William S. Ladd, and that the decree remains in full force.

The foregoing is the substance of the pleadings, so far as brought in question in this case.

The case was tried to a jury May 22, 1883. (R., 31.)

After the plaintiff had delivered in his evidence, the defendant moved for a non-suit, upon the grounds stated in the motion. (R., 30, 31.)

The jury returned a verdict for the plaintiff. (R., 31, 32.)

Plaintiff moved for a judgment on the verdict on the 23d of May, 1883, (R., 32,) which was denied, and the court directed proceedings stayed until further order. (R., 32.)

Defendant, A. J. Barrell, filed a motion for new trial, May 31, 1883, upon the grounds stated in the motion. (R., 33.)

On the same day her husband, Colburn, filed a similar motion. (R., 34.)

These motions were continued, from time to time, by the court, until June 26, 1883, on which day the motions for new trial were denied by the court, the Hon. Stephen J. Field and Mathew P. Deady sitting. The opinion of

the court was delivered by the District Judge (Deady;) (R., 36 to 40;) and on the 9th of July, 1883, a judgment was rendered upon the verdict for the recovery of the premises in suit, with costs and disbursements.

On the 14th of July, 1883, the defendants filed their bill of exceptions. (R., 43, 45.)

The transcript of the said proceedings in the County Court in the foreclosure suit is made Exhibit II to the bill of exceptions, and such Exhibit II sets out the proceedings in the foreclosure suit.

In the exceptions preserved in the bill of exceptions are—

First. That said transcript of foreclosure suit was not properly indorsed.

Second. That said Aurelia was, in said foreclosure suit, sued as wife; that her answer is not hers; that foreclosure decree of March 22, 1880, if valid, does not bar her rights as a mortgagor in her separate property, as security for debts of her husband.

Third. That said transcript shows (see R., 58) that a final decree was entered in foreclosure suit March 19, 1880, and that the court had no jurisdiction to enter the second decree of 22d of March, 1880; (R., 60;) that plaintiff had, in said ejectment suit, given in evidence—(1) copy of order of sale in foreclosure suit; (2) copy of said decree of foreclosure of March 22, prefixed to order of sale, addressed to the sheriff, dated March 23, directing sale under decree; (3) sheriff's return of sale; (4) sheriff's certificate of sale to W. S. Ladd; (5) order of confirmation of sale to W. S. Ladd; (6) copy of deed by the then and former sheriffs to Ladd, to which instruments of evidence defendants objected, on the grounds that all acts done under decree of March 22, 1880, are void, and conferred no title. (R., 44, fol. 121.)

Said bill of exceptions further stated that the plaintiff gave in evidence the original deed by W. S. Ladd and

wife to plaintiff of September 28, 1882, and that defendants excepted to such evidence, claiming that such deed passed no title in virtue of said proceedings in the foreclosure suit, and that such deed was collusively made to give United States court jurisdiction.

Said bill of exceptions further excepts for that plaintiff gave no *other* evidence than the foregoing. And thereupon defendants moved for a non-suit, which was overruled, and exceptions, by defendant, taken.

Said bill of exceptions further shows that defendants then offered in evidence copy of the judgment lien docket of said State Court, showing the decree of the 19th of March, 1880, duly docketed 19th of March, 1880, which was admitted subject to the judgment of the court as to its legal effect. And defendant then rested the case, and no other evidence was given on either side; and the court instructed the jury that the sheriff's deed conveyed the estate of defendant in the premises in controversy to said W. S. Ladd, and that the conveyance from Ladd to plaintiff vested the title in plaintiff, and that he is the owner of the premises, and entitled to possession. To which instructions the defendants excepted.

Brief.

It will be seen from the opinion of the court (R., 38) that the defendants below, the plaintiffs here, admitted that the issue in regard to the fraudulent and collusive character of the conveyance to Ladd ought to be found against the defendants; and it was so found.

It will also be seen, in the opinion of the court (R., 38,) that, on the motion to the Circuit Court for a new trial, no ground of objection to the evidence, contained in the transcript of the foreclosure proceeding, was insisted upon by the defendants in the court below, except one. The language of the opinion on this point is in these words:

"In the course of the trial the plaintiff offered in evi-

dence a transcript of the proceedings in the State Court in the case of Ladd *v.* Barrell *et ux*, to which the defendants objected for various reasons, *only one of which is pressed on the motion for a new trial.*"

The court then proceeds to state what this one ground of exceptions to evidence so pressed was. The court says:

"In this transcript there are two final decrees—one given on March 19, and the other on the 22d; and while the latter is pleaded in the replications as an estoppel, the *execution* appears to refer by date to the former."

This, then, is the only ground of error relating to admission in evidence of Exhibit 1 (R., 45) that we need to notice here, since this was the only one pressed in the court below, namely, that the foreclosure decree of March 22 was void, because the court's power over the subject-matter was exhausted by the decree of the 19th, and further, that, whilst the pleadings relied on a decree of the 22d of March, the *execution*, or order of sale, referred to, and relied for validity upon, a decree of the 19th of March.

We apprehend that it would be useless for us to enter upon any extended discussion of this alleged error in the court below, since the opinion of the court, in this case, found in the record at pages 37 to 40, furnishes a complete answer to the allegations of error based upon this point.

Still, we proceed to submit the following points:

I.

Where, as in this case, a judgment or decree of a court of general jurisdiction is attacked collaterally, all possible and necessary presumptions will be made to sustain it; and, hence, if it were necessary to presume, in order to sustain the decree, that the omission, from the decree of the 22d of March (R., 60,) of words vacating the decree

of the 19th of March, (R., 58,) was inadvertence or mistake, then such will be the presumption. So, also, will it be presumed that the replications, pleading such decree, refer to *the* decree, whatever its date, upon which the sale described in such replication *could be lawfully made;* and that, if a wrong date is named, in describing the decree in the replication, then that date will be presumed to be a mistake, and will be held immaterial.

White *v.* Crow *et als.*, 110 U. S. R., 183–188 *et seq.*

II.

It would appear, from the opinion of the court, (R., 38, 39,) that, in the trial below, an objection was made to the evidence in Exhibit No. 1, on the ground that, whilst the replications rely upon an alleged estoppel arising out of a decree of the County Court dated the *22d of March*, yet the "execution" or order of sale which was issued, and on which the sale to Ladd was made, is based upon, and refers to, a decree of said court dated the *19th of March;* and that, hence, there was a fatal variance between the averments of estoppel, set up in the replications, and the proofs submitted by means of said execution or order of sale.

This point of exception, if, as indicated by said opinion of the court, presented below, is not preserved in the record so as to be here available—this for two reasons: One reason is that the bill of exceptions and the record do not sufficiently present this exception, on the ground of alleged variance between the proof of estoppel and the pleading of the estoppel. No question in regard to the admission or rejection of evidence, or the competency of evidence, ever becomes a part of the record, unless made so by a bill of exceptions.

Storm *v.* United States, 94 U. S., 77, and cases cited.
Upton *v.* McLaughlin, 105 U. S., 644.
Booth *v.* Tiernan, 109 U. S., 205.

III.

The other reason why this alleged variance is not here available is that the instrument which is alleged to have been at variance with the pleading of estoppel in the replications, to wit, the execution or order of sale, is not made part of the record. There is no execution or order of sale contained in either the said Exhibit No. 1, (R., 45,) nor anywhere else in the record.

Hence, for this additional reason, this alleged variance is not here available, because, in order to make available an objection to the admission or rejection of evidence, so much of the evidence (here the execution) as is essential to understand the point of the objection to it must be introduced in the record.

Packet Company *v.* Clough, 20 Wall., 542, 543.
Railroad Company *v.* Smith, 21 Wall., 255.
Thompson *v.* First National Bank of Toledo, 111 U. S., 535, 536.

Even if this alleged variance were so presented by the record that it could be considered, it is, in its substance, not a material variance, because where a sale is made upon an execution which varies from the judgment, such variances are treated as mere irregularities, and not as essential defects in the title.

Jones *v.* Dove, 7 Oregon, 407.
Freeman on Executions, sec. 43, note 4.

But, aside from these reasons, there are others why the said alleged exception based upon the ground of variance, even if it were well presented in the record, discloses no error in the ruling below, some of which are given under the next head.

IV.

This next point we may state as follows:

The two decrees set forth in the record as rendered by

the County Court in the foreclosure suit, to wit, that of March 19, 1880, (R., 58,) and that of March 22, 1880, are, in contemplation of law, as well as in the substantial fact of the matter, one and the same decree.

The substantial oneness or identity of these two decrees is sufficiently and fully stated in the opinion of the court below, (R., 39, 40,) and need not be here repeated.

In regard to the exceptions by the defendants expressed in their bill of exceptions, (R., 44, 45,) other than the above-named exception already considered, alleging variance, it may be stated that they all resolve themselves into this, to wit, that the replications rely upon a decree dated the 22d of March, 1880, (R., 18, 26, 27.) and that no title could be set up by the plaintiff under his pleadings, other than a title derived from a decree of *that* date; and that, since the record shows that on the 19th day of March, 1880, the County Court, in the foreclosure suit, rendered a final decree, which "remained of record unmodified, vacated, or reversed, and that all proceedings prior thereto terminated in said decree," *therefore* "the court had no jurisdiction to enter the second decree" of the 22d of March, 1880; and hence all proceedings of sale, confirmation, &c., based upon such decree of the 22d are absolutely void.

In addition to the reasons and authorities, found in the opinion of the court below, showing that this position of the plaintiffs in error is unsound, we may suggest the following:

The radical unsoundness of this position is in its assumption that the court, during the continuance of the term at which the decree of the 19th of March was rendered, could not render a decree, on the 22d, modifying the former decree of the 19th.

The inaccuracy of this position is well indicated in the following language from this court in *Ex-parte* Lange, 18 Wall., 167:

"The general power of the court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable."

Lange's was a case where the court refused to sustain a second judgment, or sentence, in a criminal case, though at the same term. But this refusal was based upon the fact that the first judgment rendered was not so absolutely void as that the payment of the fine thereunder, by Lange, did not make such payment one "punishment," in the sense of the Constitution, which payment precluded a further and additional punishment, and hence precluded a second judgment against Lange. The opinion of the court shows that this was the ground upon which a second judgment was forbidden, and that it was not forbidden upon the ground that the court could not, during the term, render a second or different judgment vacating the first, where the first judgment had not been satisfied or the sentence executed.

This control of the courts over all judgments and decrees, whether civil or criminal, during the term, is so familiar that this court, in United States *v.* Bassett, 9 Wall., 41, has said of it the following:

"This control of the court over its own judgments during the term is of every-day practice." (Citing King *v.* Price, 6 East., 323; Cheang-kee *v.* United States, 3 Wall., 320.)

In the case of Goddard *v.* Ordway (101 U. S., 752) this court reaffirmed the doctrine stated in the sentence which we have quoted from *Ex parte* Lange, regarding the power of the courts over their own judgments during the term. There the court says:

"In *Ex-parte* Lange (18 Wall., 163) we said 'the general power of the court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable.'

(Bassett *v.* United States, 9 Wall., 38; Doss *v.* Tyack, 14 Howard, 297.) As a part of the roll of that term they are deemed to be *in the breast of the court* during the whole term. Picken's Abridgment, Title Amendment and Jeofail A."

The same thing will be found in Wells on Jurisdiction, sec. 143, p. 133; Freeman on Judgments, sec. 65; Leviston *v.* Swan, 33 Cal., 480, and cases innumerable.

From the foregoing it results conclusively that there was jurisdiction to enter the second verdict.

The same cases show that such second or modified judgment may be rendered at any time during the term. Indeed, the case of Goddard *v.* Ordway, *supra*, shows that, where a motion to vacate a judgment and grant a reargument was made at a term at which a decree was rendered, and the motion was not acted upon, but was continued as unfinished business, that prolonged the suit, and enabled the court to vacate a judgment at a succeeding term.

See also Knapp *v.* King, 6 Oregon, 243–247.

The fact that the decree of the 22d of March does not, *in terms*, vacate or modify the decree of the 19th, is utterly immaterial, because, in so far as the last decree varies from the first, its necessary legal effect is to vacate the first decree, to the extent of the variance between the two. And where the second decree purports to be a full decree, covering the entire subject-matter in judgment, there its necessary legal effect is to vacate and supersede the first decree, although it may not be so expressed *in terms*.

V.

But even if it should be held that the second decree was ineffectual, by reason of the existence of the first decree, even this would be an immaterial fact in the present case, because the result would be to leave the decree of the 19th

in full operation; and the fact that the replications described the decree, pleaded as an estoppel as of the 19th, is utterly immaterial, since the decree set up and fully described in the replications is, in its substance, accurately pleaded, and the assignment in the replications of a wrong date, to wit, the 22d, is not material, and does not go to, or vary from, the substance of the pleading as set up in the replication.

The authorities cited by the court, in its opinion on page 39, fully sustain this proposition.

There is manifestly no error in this record, and the judgment of the court below, we submit, must be affirmed.

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J. M. WILSON,
Att'ys for Def't.